United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

562

No. 22,700

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH M. BARNA, JR.
and
GALE D. BARNA,
Appellants,

v.

GERALD C. BONHAM,
WALTER ANSON BUTLER,
CAVALIER MOVING & STORAGE CO., INC.,
NORTH AMERICAN VAN LINES, INC.,
Appellees.

Appeal From the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS AND APPENDIX

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BRIEF FOR APPELLANTS

QUESTION PRESENTED

Whether or not the trial court (Corcoran, J.) was guilty of an abuse of discretion in denying plaintiffs' Objections to the 'recommendation' of the Pre-Trial Examiner to the effect that plaintiffs' motion to reinstate this action to the trial calendar be

denied; and upon plaintiffs' motion to reconsider such action, ordering, by fiat, adherence to his original ruling, thus dismissing plaintiffs' action with prejudice, pursuant to Local Rule 13 of the District Court.

STATEMENT PURSUANT TO RULE 8 (d)

Pursuant to Rule 8 (d) of the General Rules of this Court, counsel for appellants state to the Court that the pending case has not previously been before this Court under the same or similar title.

JURISDICTIONAL STATEMENT

This is an appeal by plaintiffs (husband and wife) in the trial court, from the dismissal of their complaint with prejudice, pursuant to Local Rule 13 of the trial court.

The trial court had jurisdiction of the cause under and by virtue of Title 11-306, D. C. Code of Laws, 1961 Edition, as amended.

Jurisdiction of this Court is founded on Title 28, U. S. Code, Section 1291.

STATEMENT OF THE CASE

Appellants are husband and wife, respectively. On December 22, 1961, the male appellant, a resident of East Keensburg, New Jersey, was operating a motor truck in an easterly direction on New York Ave., N.E. in the District of Columbia. At the same time, appellant No. 1 (Bonham) was also driving in an easterly

direction on New York Ave., N.E., and upon approaching the intersection of Bladensburg Road, N.E., Bonham, being unfamiliar with the area, suddenly changed lanes, moving to his right, thus causing the male appellant (Barna) to come to a stop to avoid colliding with the Bonham vehicle. He did stop, without colliding with Bonham, but was later struck from the rear by a tractor-trailer operated by the appellant Butler, also eastbound, which was owned by the corporate appellant, Cavalier Moving & Storage Co., Inc., and in the service of the appellant, North American Van Lines, Inc. As a result of the negligence of all defendants in causing the aforesaid collision, Joseph M. Barna, Jr. sustained serious personal injuries which were the basis of this action.

It will be noted from the record that all parties to this litigation are non-residents of the District of Columbia, plaintiffs being residents of New Jersey; the defendant Bonham being a resident of New York; the individual defendant Butler being a resident of Virginia; and the two corporate defendants being residents of Virginia and Maryland, respectively.

Plaintiff Bonham had originally retained New Jersey counsel, who attempted to amicably settle plaintiffs' claim, and after exhausting settlement possibilities, each set of defendants blaming the other for the accident, New Jersey counsel referred the claim to District of Columbia counsel for the purpose of suit. Suit on plaintiffs' claims was filed in the U.S. District Court for the District of Columbia, on December 16, 1964.

All defendants being non-residents of the District of Columbia, service of process was effected upon the Director of Traffic, D. C., pursuant to Title 40-423, D. C. Code, 1961 Edition, as amended, followed by registered mail service of the complaint and summons to all four defendants, and their return receipts received.

In due time all defendants answered, through counsel, the defendant Bonham cross-claiming against the remaining three defendants for contribution for all or any part of any judgment which might be rendered in favor of plaintiffs in said action.

On March 15, 1965, plaintiffs' counsel took the oral depositions of the individual defendants in the office of defense counsel, for discovery, or for use at trial, or for both purposes, pursuant to the Federal Rules.

On April 13, 1965, the defendant Bonham, by counsel filed and served upon plaintiffs' counsel, some 26 written Interrogatories, which plaintiffs, by counsel, answered on April 27, 1965.

Thereafter, on May 17, 1965, the remaining three defendants, by counsel took the oral deposition of plaintiff, in supplementation of said Interrogatories.

Up to that time there had been no Answer filed by the defendants 2, 3 and 4, to the cross-claim, whereupon, on July 12, 1965, the clerk of the trial court sent out a "first notice under Rule 13, on cross-claim only" to counsel for defendants No. 2, 3 and 4.

An Answer to the aforesaid cross-claim was filed on behalf of defendants No. 2, 3 and 4 on August 9, 1965, whereupon the case was entered "calendared" by the clerk.

The case appeared on a "Call" calendar before the Assistant Pre-Trial Examiner on February 28, 1966, which thus started the running of the usual six-month period under Local Rule 13. *On July 28, 1966, the clerk mailed to counsel for plaintiffs a "first Notice under Rule 13."*

On August 17, 1966 (within the six month period of Local Rule 13, plaintiffs' counsel filed a Motion to Remove the Case from the operation of Local Rule 13 to November 14, 1966, which motion was granted the next day (August 18, 1966) by Judge Corcoran.

The next docket entry is under the date of May 15, 1967, which reads - "Notation of Dismissal (as of 5/14/67), without prejudice." Counsel for plaintiffs had received no "Notice under Rule 13", warning of any such "dismissal" proposed, as he had previously received in July, 1966. And since he himself had moved, pursuant to the July 28, 1966 "notice", to remove the case from the operation of Rule 13 until November 14, 1966, he had assumed, since all discovery had been completed by both sides, that on or shortly after November 14, 1966 he would receive formal notice of pre-trial, since the action was already "calendared". (See affidavit of Warren E. Miller, Esq., dated December 16, 1968).

However, not receiving pre-trial notice, he did not discover the "Notation of Dismissal" (entered on the docket on 5/15/67 'as of 5/14/67') until he began making inquiry as to when the action would be pre-tried, which was in late Spring of 1968. He then filed the only motion to reinstate the action which he has ever filed in this case. This motion, in due time, came on before the Pre-Trial Examiner, and was granted, with the additional notation "to go on Ready Calendar as of 8/1/68." To this action of the Pre-Trial Examiner, all four defendants objected, filing formal Objections to Recommendation of Pre-Trial Examiner.

The said Objections of the defendants came on, in due time, for hearing before Judge Sirica, on July 5, 1968. In defendants' points and authorities in support of their 'Objections' to the Recommendation of the Pre-Trial Examiner, they had included a letter of one Dr. Glenn W. Tymeson, dated June 16, 1968, concerning the then alleged physical condition of the defendant Bonham. Since said letter was not sworn to, Judge Sirica referred the defendants' Objections back to the Pre-Trial Examiner, and particularly since he had not had such letter before him on May 29, 1968 when he, the Pre-Trial Examiner had made his Recommendation.

Defense counsel for Bonham then simply copied the letter of the aforesaid Dr. Tymeson onto legal-cap paper, sent it back to the doctor, who then swore to same before a notary public in Broome County, New York.

The very next docket entry is one of September 3, 1968, simply stating - "Affidavit of Dr. Glenn W. Tymeson, filed." And following that, as of the same date, September 3, 1968, an entry reading-' "Recommendation denying motion to reinstate case. AC/N-Pre-Trial Examiner."

Plaintiffs' counsel had received no notice of any scheduled hearing before the Pre-Trial Examiner for September 3, 1968 (see affidavit of Warren E. Miller, Esq.), and such action was taken in his absence and without his knowledge. Up to that point, the 'Recommendation' of the Pre-Trial Examiner had been in plaintiffs' favor, i.e. - "to reinstate the action, same to go on the ready calendar as of 8/1/68." If counsel for plaintiffs had received notice of any scheduled hearing before the Pre-Trial Examiner for September 3, 1968, he most certainly would have been present to support the original recommendation of the Pre-Trial Examiner.

In any event, plaintiffs' counsel was sent copy of the "Recommendation of the Pre-Trial Examiner", by mail, when, for the first time, it appeared that the Pre-Trial Examiner had reversed himself, said 'Recommendation' reading:

> "Upon consideration of plaintiffs' motion to reinstate case; the failure of counsel for plaintiff to appear at hearing thereon, whereas counsel for both defendants appeared; consideration of all of the facts of this case, including the *attached* affidavit, which would indicate prejudice might ensue to defendants by reinstatement of this case at this date, it is this 3rd day of September, 1968,

Recommended that the motion be denied.

/s/ John J. Finn.

Case assigned for hearing at 9:30 A.M.
Recommendation entered 10:24 A.M."

Be it remembered that on September 3, 1968, the matter was then pending on the defendants' "objections to the Pre-Trial Examiner's Recommendation". Not a word was said in the foregoing order about the Pre-Trial Examiner reversing himself as to his original recommendation. And be it further remembered that September 3, 1968 was a Tuesday (the day after Labor Day), at which time both counsel for the plaintiffs (Warren E. Miller, Esq.) and his associate, (Earl H. Davis) were in the office. A simple telephone call would have brought one or both on the run down to the courthouse. Yet such action was taken within less than one hour (see above).

Since the Pre-Trial Examiner's 'Recommendation' does not become the 'order of the Court' if written objections are filed thereto within five days from the date of the order, the parties and the situation was again reversed, this time plaintiffs' counsel filing Objections to the Pre-Trial Examiner's 'Recommendation.'

Said Objections were originally scheduled to be heard before Judge Corcoran on October 24, 1968. However, just prior thereto, plaintiffs' counsel, Warren E. Miller, Esq. had been in the Washington Hospital Center for proposed eye surgery due to glaucoma, but had been discharged on the night of October 23, 1968 as a poor surgical risk, thereafter being confined to his home for two weeks.

This fact was made known to defense counsel, and the Court, on the morning of October 24, 1968, whereupon the plaintiffs' objections to the Pre-Trial Examiner's Recommendation was continued to November 27, 1968.

On November 27, 1968, Earl H. Davis, Esq. entered an appearance on behalf of plaintiffs, and argued the Objections to the Court, although Warren E. Miller, Esq. was present in Court, but still physically disabled due to his eye condition. The Court upheld the Pre-Trial Examiner's 'Recommendation', and refused to reinstate the action to the ready calendar, stating - "There has to be a period at the end of the last sentence of every book sometime. I call this highly prejudicial to the defendants. They lose their witnesses. They lose track of them. Seven years to have an automobile collision suit brought to trial." Later, in making his ruling, the Court stated:"* * * * I think this is the third Rule 13, if I read the file correctly. He has lost his rights in this Court. He may have an action against his counsel. I don't know about that. I am not going to reinstate the case."

In view of the above last remark of the Court, since no "third Rule 13" is supported by the record, plaintiffs, by counsel, filed a Motion to Reconsider such action, supporting same with a memorandum of authorities; to which the defendants all filed Oppositions; and which motion the Court denied, by fiat (without argument), by order dated December 30, 1968. From such action a timely Notice of Appeal to this Court was filed on January 6, 1969.

STATEMENT OF POINT ON APPEAL

The Trial Court abused its discretion in refusing to reinstate plaintiffs' action to the 'ready' calendar for pre-trial and trial on the merits.

ARGUMENT

SINCE THE PLAINTIFFS THEMSELVES WERE NOT PERSONALLY NEGLIGENT IN THE PROTECTION OF THEIR INTERESTS, AND THEIR COUNSEL HAD NO NOTICE OF THE HEARING SET FOR SEPTEMBER 3, 1968, AND WAS NOT OTHERWISE GUILTY OF ANY DELIBERATE OR CONTUMACIOUS DISREGARD OF THE COURT'S AUTHORITY, THE COURT'S REFUSAL TO REINSTATE THIS ACTION TO THE READY CALENDAR WILL INFLICT SERIOUS INJURY UPON THE INJURED PLAINTIFF AND HIS WIFE, BOTH OF WHOM ARE INNOCENT OF ANY WRONGDOING.

Local Rule 13 of the U. S. District Court for the District of Columbia originally read as follows:

"RULE 13
DISMISSAL FOR FAILURE TO PROSECUTE
ENTRY OF DEFAULT FOR FAILURE TO PROCEED.

(a) **Clerk to warn dilatory party; dismissal without prejudice; notice of; warning.** If a party seeking affirmative relief fails for five months from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his claim, or to avail of any right arising through the default or failure of an adverse party, or take other action looking to the prosecution of his claim, or to file a certificate of readiness under Rule 11 (d) within six months from the date the action is called on the call of the civil calendar, the clerk shall warn the dilatory by mail that his claim will stand dismissed if he fails to comply with this rule making a note in the docket

of the mailing, and if the delinquency continues for six months the complaint, counter-claim, cross-claim, or third party complaint of said party, as the case may be, shall stand dismissed without prejudice, whereupon the clerk shall make entry of that fact and serve notice thereof by mail upon every party not in default for failure to appear, of which mailing he shall make an entry. One month prior to the termination of the six month period the Clerk shall warn the dilatory party by mail that his claim will stand dismissed if he fails to comply with this rule, making an entry in the docket of the mailing.

(b) **Failure to warn; effect.** A failure of the Clerk to give the warning as above provided will not affect the running of the six months' period or otherwise relieve a party from operation of this rule."

As of the time pertinent to this litigation, the above rule, as amended, now reads as follows (strike-out indicating the deleted material):

"RULE 13
DISMISSAL FOR FAILURE TO PROSECUTE
~~ENTRY OF DEFAULT FOR FAILURE TO PROCEED~~.

(a) ~~**Clerk to warn dilatory party**~~; **dismissal without prejudice; notice of; warning.** If a party seeking affirmative relief fails for *six* months from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his claim, or to avail of right arising through the default or failure of an adverse party, *or take other action looking to the prosecution of his claim,* or to file a certificate of readiness under Rule 11 (d) within six months ~~from~~ of the date the action is called on the call of the civil calendar, ~~the clerk shall warn the dilatory by mail that his claim will stand dismissed if he fails to comply with this~~

~~rule,-making-a-note-in-the-docket-of-the-mailing; and-if-the-delinquency-continues-for-six-months~~ the complaint, counterclaim, cross-claim, or third party complaint, as the case may be, shall stand dismissed without prejudice, whereupon the Clerk shall make entry of that fact and serve notice thereof by mail upon every party not in default for failure to appear, of which mailing he shall make an entry. *One month prior to the termination of the six month period the Clerk shall warn the dilatory party by mail that his claim will stand dismissed if he fails to comply with this rule, making an entry in the docket of the mailing.*

(b) **Failure to warn: effect.** A failure of the Clerk to give the warning as above provided will not affect the running of the six months' period, or otherwise relieve a party from operation of this rule."

It is interesting to note that **Local Rule 13** has again been amended by the District Court, just as late as April 21, 1969, and as published in the Daily Washington Law Reporter for April 28, 1969, reads as follows:

"ORDER

It is this 21st day of April, 1969,

Ordered that **Local Rule 13** of the Local Rules of the United States District Court for the District of Columbia be amended by adding a new subsection (d) as follows:

(d) When a case has been dismissed because of inexcusable neglect or other dereliction of counsel and is reinstated by the Court to prevent unfairness to a litigant, the Court granting the Motion to reinstate shall refer the matter involving the delinquent, or offending counsel to

the Committee on Admissions and Grievances of this Court for appropriate action, citing the circumstances of the dismissal and subsequent reinstatement. (C-45, 21 Apr. '69).

By the Court,:

Edward M. Curran,
Chief Judge."

It is respectfully submitted by appellants that rather than constantly amend the said Local Rule 13, same should be abolished in its entirety. There is no necessity for same, as other rules of Federal Civil Procedure adequately protect any litigant.

It is recalled that a little over thirty years ago, (1938), when the Federal Rules of Civil Procedure took effect, that it was the hue and cry of the defense bar, that since such rules superseded and abolished common law pleading in this jurisdiction, that the trial practice would be demoralized, that all a litigant had to do from then on was simply, in effect, write a letter to the judge, stating "I was injured at such and such a place, on the particular date of the accident", pointing to 4 Moore's Federal Practice (Pike and Fischer-Willis), Form 8.47 (page 63), Complaint for Negligence, which read as follows:

"COMPLAINT FOR NEGLIGENCE

1. (Allegation of jurisdiction)
2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff, who was then crossing said highway.
3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured,

> was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.
>
> WHEREFORE, plaintiff demands judgment against defendant in the sum of ten thousand dollars and costs."

We have come a long way since 1938 and the inception of the Federal Rules. It is respectfully submitted that with the advent of lengthy Interrogatories in almost every case, thereafter supplemented with oral depositions, counter-claims requiring answer, cross-claims (also requiring answer), third-party complaints, highly restrictive pre-trial orders, compulsory 'calls' of the civil calendar requiring the personal attendance of counsel, motions to admit, motions for production and inspection of documents (and other evidence), etc., etc., that there is not a trial lawyer in this city who has not, at one time or another, run afoul of Local Rule 13. He is constantly pushing deadlines in order to comply with the Federal Rules, and even then runs the risk of having his client's action dismissed, with or without notice. If notice is sent by the clerk, and received, it means more paper work - preparation and filing of a motion to reinstate. In most such instances, defense counsel will readily agree and consent to reinstatement, realizing that if they do not, they themselves are violating the old common law Rule 1 (either eliminating or minimizing their own fee for continued work on the case). It is the rare case where defense counsel will not consent to a reinstatement. In such event, the formal motion to reinstate, even though filed in court, does not go before a judge for hearing - it goes to the Pre-Trial Examiner, who 'recommends' a decision.

If his 'recommendation' is not satisfactory to the moving party, the moving party is then subjected to more 'paper work' - the filing of 'Objections' within five days, whereupon the Objections are then calendared for hearing before a judge finally - thus necessitating an extra appearance in court.

It is respectfully submitted that even the most conscientious trial lawyer, with only a moderate trial practice, is hard pressed to keep up with the constant dead-lines involved in such paper work, and has little or no time for research, study, or even investigation. It is further submitted that trial practice today is far more restrictive and technical than it ever was in the days of common law pleading.

Rule 5 (a), F. R. C. P., provides as follows:

> "(a) Service: When required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and *every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper be served upon each of the parties.* * * * * * *"
>
> (b) Same: How made. * * * * Service upon the attorney or upon a party shall be made *by delivering a copy to him or by mailing it to him at his last known address* * * * * * * * *" (Emphasis ours)

Local Rule 13, in attempting to follow the spirit of Federal Rule 5 (a) and (b), explicitly states in the concluding paragraph of Local Rule 13 (a) - " * * * One month prior to the termination of

the six month period the clerk *shall* warn the dilatory party *by mail* that his claim will stand dismissed if he fails to comply with this rule, *making an entry in the docket of the mailing."*

The only entry in the docket as to the dismissal which triggered this appeal, is the entry of May 15, 1967, which simply reads - "Cause dismissed under Rule 13 as of 5/14/67. (ACN) By Clerk." There is no 'entry in the docket' of the 'mailing' of any 'warning' to any dilatory 'party' or to counsel of any 'dilatory party'.

However, Local Rule 13 then completely nullifies the requirement of 'notice', both as set forth in Local Rule 13 (a) and Federal Rule 5 (a) and (b), in the next breath, where it requires:

> "(b) **Failure to warn; effect.** A failure of the clerk to give the warning as above provided will not affect the running of the six months' period or otherwise relieve a party from operation of this rule."

The fact that the one month advance warning notice of proposed dismissal, as required by Local Rule 13 (a) was not served on either plaintiff, nor their counsel, as required, deprived counsel for plaintiffs of notice of such proposed dismissal, before such 'dismissal' could lawfully become effective.

Furthermore, Local Rule 13 provides that any such dismissal is to be "without prejudice". Query, "without prejudice" to what? In ordinary legal parlance it would mean without prejudice to the filing of a new action between the same parties based upon the same cause.

In *Morse v. Bragg*, 71 App. D. C. 1, 107 F.2d 648 (1939), this Court held that - "The words 'without prejudice' in respect of a voluntary nonsuit have the effect only of causing the judgment not to operate, upon the theory of res adjudicata, as a bar to a subsequent suit by the plaintiff against the defendant on the same cause." To the same effect are many state cases, as set forth in 45 *Words & Phrases*, Permanent Edition, p. 439 et seq.

However, since this litigation arose out of a negligent tort occurring in 1961, a subsequent suit on the same cause would immediately be met by defense counsel with a plea of the statute of limitations. This Court in effect so held, in Nos. 19,868 and No. 20,139, U. S. Court of Appeals for the District of Columbia Circuit, Gloria I. Nelson et al v. Elizabeth Thompson Swift, when, on March 2, 1967, in a per curiam judgment it affirmed the judgments of the District Court, without opinion.

Thus, the plaintiffs are without remedy, unless their action is reinstated upon proper motion, as was made here, and denied, thus effectively putting them out of court.

Federal Rule 60, F. R. C. P. provides as follows:

"RELIEF FROM ORDER OR JUDGMENT

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors arising therein from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., Sec. 1655, or to set aside a judgment for fraud upon the court. Writs of coram, nobis, coram vobis, audita querela, and bills of review, and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

Plaintiffs' motion, if considered under Rule 60 (b) (1), F. R. C. P., was filed within a reasonable time after counsel learned of the dismissal by the clerk, and was within one year of such action.

Rule 1, F. R. C. P., specifically provides:

> "These rules govern the procedure in the United States District Courts in *all* suits of a civil nature whether cognizable as cases at law or in equity or in admiralty with the exceptions stated in Rule 81. *They shall be construed to secure the just,* speedy, and inexpensive determination of every action."

In view of the very spirit of the rules as thus set forth in Rule 1, F. R. C. P., relief from the operation of the judgment herein would be justified under Rule 60 (b) (6), F. R. C. P., since the disposition of this action on such summary procedure is certainly not just to these plaintiffs.

The United States Supreme Court has had occasion to comment upon the 'technicalities' of the Federal Rules. In *Conley v. Gibson,* 355 U.S. 41, 2 L. ed 2d 80, 78 S. Ct. 99, (1957) in a case in which the Hon. Joseph Waddy, now a District Court Judge here, was counsel for the petitioner, Mr. Justice Black declared:

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and accept the principle that the purpose of pleading is to facilitate a proper decision *on the merits.*"

In *Foman v. Davis*, 371 U.S. 178, 9 L. ed 2d 222, 83 S. Ct. 227 (1962), Mr. Justice Goldberg, speaking for the Court, stated:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions *on the merits* to be avoided on the basis of such mere technicalities." and after then citing the words of Justice Black, in *Conley, supra*, he concluded:
>
> "The rules themselves provide that they are to be construed 'to secure the *just*, speedy and inexpensive determination of *every* action' " Rule 1." (emphasis ours).

The Supreme Court laid down the rules of construction to be applied to Rule 60 (b), F. R. C. P., in *Klapprott v. United States*, (1948), 335 U. S. 601, 93 L. ed 266, 69 S. Ct. 384, where it held that sub-sections (1) and (6) were mutually exclusive - that is, if the circumstances alleged in a motion constituted excusable neglect (or mistake, inadvertence or surprise) as set forth in sub-section (1), the motion was restricted to that sub-section and relief could not be granted under sub-section (6). Therefore, if the plaintiffs here can show no more than mistake, inadvertence, surprise or excusable neglect, the one-year time limitation would apply, and since their motion to reinstate was filed within said limitation, they are entitled to the relief requested, i.e. - reinstatement. However, the circumstances here (lack of notice) constitute more than excusable neglect, and relief from such dismissal may be granted because the motion to reinstate was made within a reasonable time after discovering the dismissal (without notice), under sub-section (6), since such summary dismissal and refusal to reinstate was not a *just* determination of the action on the merits.

In *Lucas v. City of Juneau,* 20 F.R.D. 407 (1957), in granting a motion for reinstatement of an action dismissed for lack of prosecution, it was held that Rule 60 (b), F. R. C. P., authorizing a judge to relieve a party for "any other reasons justifying relief from operation of the judgment" does not only apply to "judgments", but that, even if it did, an order dismissing an action for lack of prosecution constituted such a judgment. In Lucas, supra, there had been proper service of process; the pleadings had put the case at issue; and there had been a date set for trial. However, plaintiff's attorneys had abandoned the case of their client, who was then under medical care outside the jurisdiction (in San Francisco), without notice to the client, and had permitted an order dismissing the case to be entered without the client's knowledge or consent.

This Court, on several occasions, has granted relief under analagous circumstances.

In *Bridoux v. Eastern Air Lines, Inc.,* 93 U. S. App. D. C. 369, 214 F. 2d 207 (1954), a motion had been made by an alien to vacate a default judgment against him in the amount of $160,000.00, and to reinstate the action for trial on the merits. The District Court denied the requested relief, and the appellate court **reversed,** stating:

> "Since courts universally favor trial on the merits, slight abuse of discretion is refusing to set aside a default judgment is sufficient to justify a reversal of the order."

In *Williams v. Capital Transit Co.,* 94 U. S. App. D. C. 221, 215 F.2d 487 (1954), this Court affirmed the action of the District Court in setting aside a default judgment and in quashing service

of process, holding such such a motion was proper and timely even though filed *three years* after the purported service of process.

In *Lafferty v. District of Columbia*, 107 U. S. App. D. C. 318, 277 F.2d 348 (1960), a proceeding on petition to review and expunge a decree adjudging the petitioner to be of unsound mind, was involved. The District Court rendered judgment adverse to the petitioner. On appeal, this Court **reversed**, holding that the petitioner's delay of some *two and a half years* in instituting the proceedings for review of the decree adjudging him to have been of unsound mind after he learned of the decree which was entered without his having been afforded the required statutory notice of the hearing, did not, under the circumstances, constitute unreasonable delay or a ground for denial of the requested relief.

In *Barber v. Turberville*, 94 U. S. App. D. C. 335, 218 F. 2d 34, (1954) an attorney's failure to answer one of two cases given him by his client, resulted in a default judgment against the client in the sum of $10,000.00 on a charge of criminal conversation. The District Court refused to vacate the default. On appeal, this Court **reversed**, stating:

> "That the defendant personally was not negligent in the protection of her interests seems clear from the facts recited. In situations such as are here disclosed, the courts have been reluctant to attribute to the parties the errors of their legal representatives."

It is to be noted also, in *Barber, supra*, that although Judge Prettyman dissented, in the very next case which considered the subject, namely, *L. P. Steuart, Inc. v. Matthews*, 117 U. S. App. D. C. 279, 329 F.2d 234 (1964), petition for rehearing en banc

denied March 9, 1964, which was some 10 years after the decision in Barber, supra, Judge Prettyman was with the majority in affirming the District Court's action in reinstating a suit which had been dismissed for want of prosecution, and in holding that the trial court cannot abuse his discretion in thus reinstating the suit *some two years later* under the rule authorizing relief for any other reason justifying relief from operation of a judgment, where personal problems of counsel had caused him to grossly neglect a diligent client's cause and to mislead the client.

To the same effect, see *In Re Cremida's Estate*, 14 F.R.D. 15 (D. C., Alaska, 1953).

On the question of abuse of discretion in refusing to set aside a default judgment, see *Butner v. Neustadter*, 324 F.2d 783 (9 Cir., 1963), citing *Brill v. Fox*, 211 Cal. 739, 297 P. 25 (1931), on the type of "discretion" involved.

In *Allegro v. Afton Village Corporation*, 9 N.J. 156, 87 A.2d 430, the Supreme Court of New Jersey stated:

> "The dismissal of a party's cause of action is drastic punishment and should not be invoked except in those cases where the action of the party shows a deliberate and contumacious disregard of the Court's authority. *Lang v. Morgans' Home Equipment Corp.*, 6 N.J. 333, 78 A.2d 705. * * * *"
>
> " * * * courts exist for the sole purpose of rendering justice between parties according to law. While the expedition of business and the full utilization of their time is highly to be desired, the duty of administering justice in each individual case must not be lost sight of as their paramount objective. *Pepe v. Urban*, 11 N.J. Super. 385, 78 A.2d 406 (Appt. Div. 1951)"

In *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242 (1951), the Third Circuit Court of Appeals, in reversing the denial of a motion to set aside a default judgment, stated:

> "What is excusable neglect and what is inexcusable neglect can hardly be determined in a vacuum. The opinion of the Court below does not reveal what standard was applied nor what factors were weighed. The recent cases applying Rule 60(b) have uniformly held that it must be given a liberal construction. Matters involving large sums should not be determined by default judgments if it can reasonably be avoided. (citing cases). Any doubt should be resolved in favor of the petition to set aside the judgment so that cases can be decided on their merits. Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments. We are of the opinion that the court below applied a standard of strictness rather than one of liberality in concluding that justice did not require that the judgment be set aside."

To same effect, see *Peardon v. Chapman*, 169 F. 2d 909 (3 Cir. 1948).

The District of Columbia Court of Appeals has consistently recosnized that only a slight abuse of discretion in refusing to set aside default judgments may justify reversal. See *Manos v. Fickenscher*, D. C. Mun. App., 62 A.2d 791 (1948), *Meadis v. Atl. Constr. & Supply Co.*, D. C. Mun. App., 212 A.2d 613 (1965), *Barr v. Rhea Radin Real Estate, Inc.*, D. C. Munc. App. #4314, Apr. 3, 1969.

With respect to the failure of the clerk of the District Court to give the prescribed notice required by Local Rule 13 (a) (in effect nullified by the statement in Local Rule 13 (b), attention is directed to the following remarks of the U. S. Supreme Court, in *Hill v. Hawes*, 320 U. S. 521, 88 L. Ed 285, where that Court, in construing Rule 77 (d), F. R. C. P., stated:

> "It is true that Rule 77 (d) does not purpose to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think (page 286 of 88 L. Ed) of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given."

CONCLUSION

It is respectfully submitted that upon the facts of this case, and the foregoing authorities, that the District Court (Corcoran, J.) erred in refusing to reinstate plaintiffs' action to the ready calendar; that his action in thus refusing reinstatement was an abuse of discretion; and that for such error this Court should reverse, and remand the cause with directions to reinstate the case to the ready calendar.

Respectfully submitted,

EARL H. DAVIS,
810-18th Street, N. W.,
Washington, D. C. 20006.
Attorney for Appellants

INDEX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(1)	JOSEPH M. BARNA, JR.	)	
(2)	GALE D. BARNA	)	
	Plaintiffs	)	
	v.	)	Civil Action No. 3096-64
(1)	GERALD C. BONHAM	)	
(2)	WALTER ANSON BUTLER	)	
(3)	CAVALIER MOVING AND STORAGE COMPANY, a corporation	)	
(4)	NORTH AMERICAN VAN LINES, INC., a corporation	)	
	Defendants	)	

DOCKET ENTRIES

1964

Dec. 16	Complaint appearance, jury demand.
Dec. 16	Summons (2), copies (2) and copies (2) of Complaint issued to Deft. #1, D.M.V. #1, Ser 12-23.
Dec. 16	Summons (2), copies (2) and copies (2) of Complaint issued to Deft. #2, D.M.V. #2, Ser 12-23.
Dec. 16	Summons (2), copies (2) and copies (2) of Complaint issued to Deft. #3, D.M.V. #3, Ser 12-23.
Dec. 16	Summons (2), copies (2) and copies (2) of Complaint issued to Deft. #4, Ser 12-23.

1964	
Dec. 22	Traffic Act bond of pltfs in amt. of $250.00 with Hartford Accident & Indemnity Co. approved. Tamm, J.
1965	
Jan. 14	Answer of defendants 2, 3 & 4 to complaint. Appearance of Cornelius H. Doherty. Filed.
Jan. 21	Answer of defendant #1 to complaint, and cross-claim vs. defendants #3 and #4 c/m 1-19-65. Appearance of Thomas V. Moore. Filed.
Apr. 8	Deposition of Walter Anson Butler & Gerald C. Bonham, 3-15-65. (Costs $43.20). Filed.
Apr. 13	Interrogatories by defendants to plaintiff; c/m 4-12-65. Filed.
Apr. 27	Answer of plaintiff to interrogatories; c/m 4/27/65. Filed.
Apr. 30	Notice of defendants 2, 3, and 4 to take deposition of plaintiff #1; c/m 4/28/65. Filed.
Jun. 11	Deposition of plaintiff #1, May 17, 1965, (Costs $71.20). Filed.
Jul. 12	First notice under rule 13 on cross-claim only.
Aug. 9	Answer of defendants #3 and #4 to cross-claim. Filed.
Aug. 9	Calendared (N) AC/N.
1966	
Feb. 28	Called. Ass't. Pretrial Examiner.
July 28	First notice under Rule 13.

1966	
Aug. 17	Motion of pltff. to remove cause from operation of Rule 13. (Consent). Filed.
Aug. 18	Order staying Rule 13 to and including November 14, 1966. (N). Corcoran, J.
1967	
May 15	Cause Dismissed Under Rule 13 as of 5-14-67. (ACN) By Clerk.
1968	
May 13	Motion of pltff. to reinstate; P&A, c/m 5-13-68. M.C. Filed.
May 20	Opposition of defts. to motion to reinstate c/m 5-17-68; Exhibits (2). Filed.
May 21	Opposition of deft. #1 to motion to reinstate; Exhibit (2) c/m 5-21-68. Filed.
May 21	Appearance of Bernard J. Harig for deft. #1. AC/N. Filed.
May 29	Recommendation allowing plaintiff's motion to reinstate case; action to be placed on ready calendar as of August 1, 1968. AC/N. Pretrial Examiner.
June 5	Opposition of defts. to recommendation of Pretrial Examiner; P&A; c/m 6-4-68. M.C. Filed.
July 5	Order referring opposition to motion to reinstate the cause back to the Pretrial Examiner for additional consideration of the oppositions thereto. (N) Micro. 7/8/68. Sirica, J.
Sept. 3	Affidavit of Dr. Glenn W. Tymenson. Filed.
Sept. 3	Recommendation denying motion to reinstate case. AC/N - Pretrial Examiner.

1968	
Sept. 9	Objections of Plaintiff to Recommendation of Pretrial Examiner; c/m 9/9/68. M.C. Filed.
Oct. 10	Opposition of deft. #1 to objections to recommendation of Pretrial Examiner c/m 10/9/68. Filed.
Oct. 17	Opposition of defts. 2, 3, & 4 to objections to recommendation of Pretrial Examiner. c/m 10/16/68. Filed.
Nov. 27	Appearance of Earl H. Davis, counsel for pltff.; P/S 11/27/68; AC/N. Filed.
Dec. 5	Transcript of proceedings Nov. 27, 1968; Vol. 1; Pages 1-8; Eva Marie Sanche, Reporter (Court's Copy). Filed.
Dec. 11	Order adopting recommendations of Pretrial Examiner and denying motion of plaintiff to reinstate. (N) Corcoran, J.
Dec. 18	Motion of pltffs. to reconsider pltff's objections to the recommendation of Pretrial Examiner and the ruling made thereon on 11/27/68 and to thereafter sustain pltff's. objections and reinstate this cause to ready calendar; affidavit; P&A; c/m 12/16/68; M.C. Filed.
Dec. 31	Opposition of deft. #1 to motion to reconsider plaintiff's objections to recommendation of Pretrial Examiner and ruling made thereon; memorandum; c/m 12/31/68. Filed.
Dec. 31	Memorandum of defts. 2, 3, & 4 to motion to reconsider. c/m 12/31/68. Filed.
Dec. 30	Order denying motion to reconsider plaintiffs' objections to recommendation of Pretrial Examiner and the ruling of November 27, 1968. (N) Micro 1/28/69. Corcoran, J.

1969

Jan. 6	Notice of Appeal by plaintiffs of order entered 12/30/68. Copies mailed to Bernard J. Harig and Patrick J. Attridge. Deposit $5.00 by Davis. Filed.
Feb. 4	Record on Appeal delivered to USCA; Deposit by Earl H. Davis. $1.40. Filed.
Feb. 4	Receipt from USCA for original papers. Filed.

[Filed 5-13-68]

MOTION TO REINSTATE CASE

Comes now plaintiff, by counsel, and shows to the Court that this cause was dismissed, without prejudice, for failure to prosecute as of May 14, 1967. No notice of dismissal was received by plaintiffs' counsel prior to such dismissal as required by Rule 13 of the Civil Rules of this Court or Rule 5(a) of the Rules of Civil Procedure.

The action of the Clerk of the Court in dismissing this case for want of prosecution was void, illegal and of no effect under the rule because no advance notice or warning from the Clerk was received by counsel for plaintiffs prior to dismissal as required by both Rule 13 of the local civil rules and Rule 5 of the Rules of Civil Procedure, nor was entry made in the docket of the mailing of such notice as required by Rule 13.

The fact that the one months' advance warning notice of dismissal, as required by Rule 13 to be in writing, was not served on counsel for plaintiffs as provided in said Rule, was prejudicial to plaintiffs. It deprived counsel for plaintiffs of the notice of dismissal to which he was entitled before such dismissal could lawfully become effective. If counsel for plaintiffs had been notified by the Clerk of the impending dismissal of this case as required by the rules, counsel for plaintiffs could have taken action to avoid the dismissal.

Rule 13 of the United States District Court Rules provides:

"RULE 13

DISMISSAL FOR FAILURE TO PROSECUTE

(Revised June 27, 1961)

(a) DISMISSAL WITHOUT PREJUDICE: NOTICE OF; WARNING. If a party seeking affirmative relief fails for six months from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his claim, or to avail of a right arising through the default or failure of an adverse party, or take other action looking to the prosecution, or to file a certificate of readiness under Rule 11 (d) within six months of the date the action is called on the call of the civil calendar, the complaint, counterclaim, cross-claim, or third party complaint of said party, as the case may be, shall stand dismissed without prejudice, whereupon the Clerk shall make entry of default for failure to appear, of which mailing he shall

make an entry. One month prior to the termination of the six months period his claim will stand dismissed if he fails to comply with this rule, making an entry in the docket of the mailing. (Revised June 27, 1961) (b) FAILURE TO WARN-EFFECT. A failure of the Clerk to give the warning as above provided will not affect the running of the six months period or otherwise relieve a party from operation of the rule."

Rule 5(a) of the Rules of Civil Procedure, provides:

" * * * * every written notice, appearance, demand offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties * * *

"(b) Same: How Made.

* * * Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address * * *."

Counsel for plaintiff received no advance notice of warning from the Clerk as above provided by Rule 13 and after he learned of the dismissal of this case when making a review of the court file he served opposing counsel with this motion to reinstate.

Plaintiffs rely upon Rule 60(b) of the Rules of Civil Procedure in support of their motion, which provides:

> "On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; *** or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. ***"

The Supreme Court has had occasion to comment as follows upon the technicalities of the Federal Rules of Civil Procedure:

> "It is too late in the day and entirely contrary to spirit of the Federal Rules of Civil Procedure for the decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' Conley v. Gibson, 355 U.S. 41, 48, 2 L.Ed. 2d 80, 86, 78 S.Ct. 99.
>
> The rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1." Foreman v. Davis, 37 U. S. 178, 9 L. Ed. 2d 222, 225, 226, 83 S. Ct. 227 (1962).

In Barber v. Turbeville, 94 U.S. App. D.C. 335, 218 F.2d 154, an attorney's failure to answer one of two cases given him by his client resulted in a default judgment against the client in the sum of $10,000 on a charge of criminal conversation. The District Court refused to vacate the default. On appeal, our Court of Appeals reversed, stating (at page 337)

> "That the defendant personally was not negligent in the protection of her interests seems clear from the facts recited. In situations such as are here disclosed, the courts have been reluctant to attribute to the parties the errors of their legal representatives."

In Standard Grate Bar Co. v. Defense Plant Corp. et al, D. C. 3 FRD 371, at page 372, the Court said in vacating a default judgment "powers vested in the trial courts by Rule 60(b) should be liberally exercised in order that cases may be disposed of upon their merits * * *."

In Erick Rice Bridoux v. Eastern Airlines, 93 U.S. App. D. C. 369, 214 F.2d 206, the Court said at page 210: "Since courts universally favor trial on the merits, slight abuse of discretion in refusing to set aside a default judgment is sufficient to justify a reversal of the order." Madson Petrie Tractor and Equipment Co., 106 Mont. 382, 77 P.2d 1038, 1040. Manos v. Fickenacher, Mun. App. D.C., 62 A.2d 791, 793. See, also Tozer v. Charles A. Krause Milling Co., supra, 189 F.2d at page 245; 3 Barron and Holtzoff Federal Practice and Procedure, Rules Ed. Par. 1323.

In Allegro v. Afton Village Corporation, 9 N.J. 156, 87 A.2d 430, 432, the Supreme Court of New Jersey stated:

"The dismissal of a party's cause of action is drastic punishment and should not be invoked except in those cases where the action of the party shows a deliberate and contumacious disregard of the Court's authority. Lang v. Morgan's Home Equipment Corp., 6 N.J. 333, 78 A.2d, 705.

" * * * courts exist for the sole purpose of rendering justice between parties according to law. While the expedition of business and the full utilization of their time is highly to be desired, the duty of administering justice in each individual case must not be lost sight of as their paramount objective. Pepe v. Urban, 11 N.J. Super. 385, 78 A.2d 406 (App. Div. 1951)"

Neither counsel nor plaintiff were notified of the dismissal prior to when it occurred. This lack of notice operated to prejudice plaintiff.

The dismissal order, if permitted to stand, will inflict serious injury upon the injured plaintiff and his wife who are innocent of any wrong doing.

Right of action accrued when the injury occurred on December 22, 1961, and a new suit for such injury is now barred by the statute of limitation. Plaintiffs' cause of action here was their property and dismissal of this law suit under the circumstances existing in this case was without due process of law.

In Hendrie Buick Co. v. Mack, 355 P.2d 892, the Court quoted Rogers v. Tapo, supra, 72 Ariz. at page 57, 230 P.2d at page 525," a party should be given a reasonable opportunity to litigate his claim

or defense on the merits; that any doubt which may exist as to whether a default should be set aside should be resolved in favor of the application, to the end that a trial upon the merits may be had."

With respect to the failure of the Clerk to give the prescribed notice, attention is directed to the following remarks of the U.S. Supreme Court in Hill v. Hawes, 320 U.S. 521-523, 88 L.Ed. 285, where the Court in construing Rule 77(d) of the Rules of Federal Procedure stated:

> "It is true that Rule 77(d) does not purpose to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think (page 286) of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that be given."

As in the above case, counsel for plaintiffs here was entitled to rely upon the requirement that notice as prescribed by the Court rules would be given; and to base his actions upon the premise that these requirements of the rule would be followed.

The action of the Clerk of the Court in dismissing this case for want of prosecution was void, illegal and of no affect under the rule because prior to dismissal no written notice was served upon counsel for plaintiff, pursuant to the following requirements 6f Rule 13 of the Local Civil Rules:

"One month prior to the termination of the six month period the clerk shall warn the dilatory party by mail that his claim will stand dismissed if he fails to comply with this rule, making an entry in the docket of the mailing." No such warning was given by the clerk.

This lack of procedural "due process" invalidated the attempted dismissal of plaintiff.

WARREN E. MILLER
Attorney for Plaintiff
810 18th St., N.W.
Washington, D. C.

[Certificate of Service]

[Filed 5-20-68]

MEMORANDUM IN OPPOSITION
TO MOTION TO REINSTATE

Comes now the defendant, Walter Anson Butler, Cavalier Moving and Storage Company, a Corporation and North American Van Lines, Inc., a Corporation, and in opposition to the plaintiffs' motion to reinstate says:

That this is an action for personal injuries which are alleged to have occurred as a result of an automobile accident on December 22, 1961. The summons and complaint were not filed until December 16, 1964, about one (1) week prior to the running of the Statute of Limitations. The deposition of the defendants, Gerald C. Bonham and

Walter Anson Butler, were taken on March 15, 1965. The plaintiff's answers to interrogatories were filed in the latter part of April, 1965. On May 17, 1965, the deposition of the plaintiff, Joseph M. Barna, Jr. was taken and at this point it would appear that all discovery was completed.

The case came on for calendar call on February 28, 1966, and the case was merely called and not certified to the ready calendar. No effort was made at that time, or thereafter by the plaintiffs, to have the case placed on the ready calendar, although discovery had been completed.

On August 3, 1966, counsel for the defendants, Walter Anson Butler, Cavalier Moving and Storage Company, a Corporation and North American Van Lines, Inc., a Corporation, received a post card from the Clerk of the Court advising that the case would be dismissed under Rule 13 for failure to prosecute. Shortly thereafter, the plaintiffs filed a motion to stay the operation of Rule 13 until November 14, 1966, and an order was entered to that effect by Judge Corcoran on August 18, 1966.

Thereafter, the plaintiffs took no further action to prosecute their case, and in May of 1967, counsel for the defendants, Walter Anson Butler, Cavalier Moving and Storage Company, a Corporation and North American Van Lines, Inc., a Corporation, received a notice from the Clerk of the Court advising that the cause would stand dismissed under Rule 13 for failure to prosecute as of May 14, 1967. Still the plaintiffs took no steps to prosecute their claim.

Almost six and a half (6-1/2) years have expired since this cause of action accrued. The plaintiffs were dilatory in filing their complaint, the same having been filed just before the Statute of Limitations was to run. They were thereafter dilatory in certifying the

case to the ready calendar, and in fact upon receipt of a notice that the case was dismissed, filed a motion for a stay of Rule 13 on November 14, 1966. That date was chosen by them. It is assumed that whatever discovery they intended to undertake, would be completed prior to that date, but the plaintiffs did nothing. It was obviously another attempt to delay ultimate disposition of this matter.

Counsel says he received no advance warning from the Clerk that the case would be dismissed under Rule 13. This counsel received a notice on August 3, 1966, and it is assumed that counsel for the plaintiffs received the same notice, for shortly thereafter he filed a notice to stay the execution of Rule 13, and specifically asked that this be done until November 14, 1966. Nothing having been done by that date, the Clerk of the Court sent counsel for the defendants, Walter Anson Butler, Cavalier Moving and Storage Company, a Corporation and North American Van Lines, Inc., a Corporation, a notice of dismissal to be effective as of May 14, 1967.

It is indeed strange that counsel for the plaintiffs did not receive a similar notice, but even if he did not, he certainly received the first notice. He specifically requested a stay until November 14, 1966, and therefore knew, without any further notice, that the case would be dismissed in six months subsequent to that date. Further, there is no requirement that he receive any notice, for the rule specifically provides that the failure of the Clerk to give the warning required will not effect the running of the six month period.

It certainly is coincidental that the present motion was filed one (1) day short of one full year since the case has been dismissed. Another day longer and the plaintiffs would have been completely barred under Rule 60(b) of the Federal Rules of Civil Procedure from having their cause of action reinstated, and the Court would have no opportunity to exercise its discretion. On each occasion when the plaintiffs were required to act, they have waited until the last minute to do so. It is obvious that the plaintiffs are not interested in diligently prosecuting their claim.

The defendants, Walter Anson Butler, Cavalier Moving and Storage Company, a Corporation and North American Van Lines, Inc., a Corporation, have been greatly prejudiced as a result of these dilatory tactics in that at least one of the witnesses has died and the memory of the others has certainly faded with the passage of time. The plaintiffs have had an ample opportunity to have a trial on the merits, but they have consistently refused to do so. The plaintiffs' motion to reinstate should be denied.

DOHERTY, ATTRIDGE & DOHERTY

By: _____

Patrick J. Attridge
1010 Vermont Avenue, N.W.
Washington, D.C. 20005
NAtional 8-6257
Attorneys for Defendants,
Walter Anson Butler, Cavalier
Moving and Storage Company,
a Corporation and North
American Van Lines, Inc., a
Corporation.

[Certificate of Service]

[Filed 5-21-68]

OPPOSITION OF THE DEFENDANT, BONHAM, TO MOTION TO REINSTATE

Comes now the defendant, Gerald C. Bonham, by his attorney and oppose the Motion to Reinstate Case for the following reasons:

1. Notice of Dismissal was received by counsel for this defendant and it can be assumed notice was also mailed to counsel for the plaintiffs. After First Notice under Rule 13 was received, a motion to remove case from operation of Rule 13 was made. The notice staying Rule 13 to and including 11/14/66 was received and it can be assumed that these were also mailed to counsel for plaintiffs. (Defendant's exhibit attached.)

2. The defendant, Gerald C. Bonham is now 72 years of age. He is under a doctor's care and only travels when it is absolutely necessary that he do so. The passage of so much time, 6 1/2 years since the accident has not served to improve the clarity with which the events of the occurrence can be recalled. This delay has greatly prejudiced him since his health will not allow a vigorous defense with which he could offer in previous years. The defendant, Gerald C. Bonham, asks that the Motion to Reinstate be denied.

/s/ BERNARD J. HARIG
Attorney for Defendant
740 Washington Building
Washington, D. C. 20005
783-5377

[Certificate of Service]

Civil Action No. 3096-64

RECOMMENDATION OF PRETRIAL EXAMINER

Upon consideration of plaintiff's motion to reinstate case, the opposition thereto, and oral argument thereon, it is this 29th day of May, 1968,

RECOMMENDED that the motion be allowed; and

FURTHER RECOMMENDED that the action be placed on the Ready Calendar as of August 1, 1968.

/s/ John J. Finn
PRETRIAL EXAMINER

NOTE: Under Local Civil Rule 9(i)(1) the above Recommendation becomes the order of the Court unless objections thereto are filed within five days in conformity with Rule 9(i)(2).

Counsel for P and Deft. #1
COPIES TO COUNSEL (in person) 5/29/68
(by mail)
Counsel for Ds #2, 3 & 4

JJF
(Initials)

[Filed 9-3-68]

RECOMMENDATION OF PRETRIAL EXAMINER

Upon consideration of plaintiffs' motion to reinstate case; the failure of counsel for the plaintiffs to appear at hearing thereon, whereas counsel for both defendants appeared; consideration of all of the facts of this case including the attached affidavit, which would

indicate prejudice might ensue to defendants by reinstatement of this case at this date, it is this 3rd day of September, 1968,

RECOMMENDED that the motion be denied.

/s/ John J. Finn,
Pretrial Examiner.

Case assigned for hearing at 9:30 A.M.

Recommendation entered 10:24 A.M.

[Filed 11-27-68]

ENTRY OF APPEARANCE

The Clerk of the Court will please enter the appearance of the undersigned as trial counsel for plaintiff in the above entitled action.

/s/ Earl H. Davis
Attorney for Plaintiff,
810-18th Street, N.W.
Wash. D.C.
NA. 8-0995.

[Certificate of Service]

HEARING ON OBJECTIONS

* * *

Washington, D. C.

Wednesday, November 27, 1968

The above-entitled cause came on for hearing on objections to recommendation of Pretrial Examiner before the HONORABLE EDWARD F. CORCORAN, United States District Judge.

* * *

3 P R O C E E D I N G S

THE DEPUTY CLERK: Joseph M. Barna, Jr., et al versus Gerald C. Bonham, et al, Civil Action No. 3096-64.

MR. DAVIS: Good morning, Your Honor.

THE COURT: Good morning, Mr. Davis.

MR. DAVIS: I am not formally in this case as yet, if Your Honor please, but I will file a formal appearance at this time as trial attorney on behalf of the plaintiffs.

THE COURT: Very well.

ARGUMENT IN SUPPORT OF OBJECTIONS

MR. DAVIS: If the Court please, this matter is before Your Honor this morning on the plaintiffs' objections to the recommendation of the Pretrial Examiner as of September 3rd, 1968, that the plaintiffs' motion to reinstate be denied and that the action not be certified to the ready calendar.

It had previously, by order of May 29th, 1968, been recommended by Mr. Finn that the action be placed on the ready calendar as of August 1, 1968.

Briefly, if Your Honor please, this litigation arises out of a rear-end collision in this City in December of 1961. The plaintiff, who is a non-resident, was represented by New Jersey counsel who referred the matter sometime in 1964. Your Honor will note it has

4 a Civil Action No. 3096-64. Suit was then filed and at that time, the matter was taken over by the late Mr. G. Arnold who was a partner of Mr. Miller. He died in 1966.

Up to that time, all discovery had been completed. Both the plaintiff and both individual defendants had been deposed. Since that time, by reason of rather serious illness, Mr. Miller has been conducting a one-man office. As a matter of fact, he is here today suffering with glaucoma.

This motion was before Your Honor last month. Your Honor will recall I came down personally and requested a continuance to today. At that time, Mr. Miller was in the Washington Hospital Center for eye surgery.

Now, I understand that on September the 3rd, the matter was before Mr. Finn. Mr. Miller had received no notice of a pretrial hearing at that time. That was the date that Mr. Finn made the recommendation by reason of an affidavit filed as to the defendant No. 1, Mr. Bonham, who I believe is in Binghamton, New York suffering with some physical affliction that his doctor certifies would be injurious to him testifying orally, either at a trial or even on deposition.

Mr. Finn took the position that if the case went to trial, it would be prejudicial as to the remaining three defendants, one individual and two corporate defendants.

On behalf of the plaintiffs, we are willing to dismiss the action as to Mr. Bonham if his physical condition, according to the doctor's certificate, precludes his appearance or even taking his deposition, and certify it ready as to the remaining three defendants.

Your Honor will see from the file, there has been a lot of work done on this case. It is ready for trial now. I think even though there may be facts which show excusable neglect on the

part of Mr. Miller, that fact should not be attributable to the client who is and will be ready for trial any time the case is called upon the merits.

We respectfully submit, if Your Honor please, the recommendation of the Pretrial Examiner should be overruled and the case certified to the ready calendar.

THE COURT: This case is seven years old.

MR. DAVIS: Four years in this Court. As Your Honor sees, the depositions have been taken. Everybody has been deposed. All that remains to be done is let a jury hear the case.

THE COURT: The accident was in 1961. They filed a couple days prior to the tolling of the statute in December 1964.

MR. DAVIS: That is because New Jersey counsel, forwarding counsel, had been attempting to endorse a settlement possibility and each defendant blamed the other. The plaintiff was in the middle of a three-car chain collision. Bonham is alleged to have stopped suddenly without signal; the plaintiff stopped behind him without collision and was struck in turn by the corporate defendant's vehicle.

THE COURT: There has to be a period at the end of the last sentence of every book sometime. I call this highly prejudicial to the defendants. They lose their witnesses. They lose track of them. Seven years to have an automobile collision suit brought to trial.

MR. DAVIS: I think it is highly prejudicial to the plaintiff too, if Your Honor please. He is the victim of this collision suit through no fault of his own.

THE COURT: Why doesn't he press his suit then?

For seven years, he sits back and does nothing. Now he says, I can't be put out.

MR. DAVIS: Well he has been pressing. Everybody has been deposed in the case; and if Mr. Bonham can't appear, under the rules, his deposition can be used.

THE COURT: The way I see this file, this is the second or third time he has asked for reinstatement. He has let it go two or three times before. He has been under Rule 13 at least twice before, I believe, if I read the file correctly.

MR. DAVIS: That is why I have entered an appearance, if Your Honor please. I would like, as trial counsel, to dispose of it.

ORAL RULING OF THE COURT

THE COURT: No. I am going to uphold the Pretrial Examiner's ruling. We have got to dispose of litigation, Mr. Davis. We can't kick it around for seven years.

MR. DAVIS: It has only been four years in this Court, if Your Honor please.

THE COURT: It is seven years since the accident. That is a long time for a plaintiff to assert his rights. He has had at least two Rule 13's on him before. I think this is the third Rule 13, if I read the file correctly. He has lost his rights in this Court.

8 He may have an action against his counsel. I don't know about that.

I am not going to reinstate the case.

MR. DAVIS: Very well, Your Honor.

(Whereupon, the hearing was concluded.)

* * *

[Filed 12-11-68]

ORDER

This cause came on for hearing before the Court on the plaintiffs, Joseph M. Barna, Jr. and Gale D. Barna, opposition to the recommendations of the pre-trial examiner, that the plaintiffs' motion to reinstate the cause be denied, and upon consideration of the record herein and argument of counsel, it is, by the Court, this 11th day of December, 1968,

ORDERED that the recommendations of the pre-trial examiner be adopted and that the plaintiffs' motion to reinstate this cause be, and hereby is, denied.

/s/ Howard F. Corcoran
Judge

[Certificate of Service]

[Filed 12-18-68]

MOTION TO RECONSIDER PLAINTIFFS' OBJECTIONS TO RECOMMENDATION OF PRE-TRIAL EXAMINER AND THE RULING MADE THEREON ON NOVEMBER 27, 1968, AND TO THEREAFTER SUSTAIN PLAINTIFFS' OBJECTIONS AND REINSTATE THIS CAUSE TO THE READY CALENDAR

Comes now the plaintiffs, by counsel, and respectfully move this Honorable Court to reconsider the plaintiffs' objections to the recommendation of the pre-trial examiner made herein on September 3, 1968 in denying plaintiffs' motion to reinstate this action, and this Court's order of November 27, 1968 in upholding the

pre-trial examiner's ruling and denying reinstatement of this action; and upon rehearing thereof, to overrule the pre-trial examiner's ruling, and to grant reinstatement of this action to the trial calendar.

Be it remembered that upon the hearing hereon on November 27, 1968, it appears from the transcript thereof, that this Court was under the impression, when the prior ruling was made, that "this is the third Rule 13, if I read the file correctly."

It is respectfully submitted that the Court's reading of the file was incorrect.

A study of the file and the docket of this action indicates that on July 12, 1965, there was entered a "First Notice Under Rule 13, on Cross-Claim only." It also appears that on January 21, 1965, when defendant No. 1 (Bonham) filed his Answer, he also filed a cross-claim against the remaining three defendants for contribution. The remaining three defendants did nothing with respect thereto for approximately six (6) months until said Notice was sent, after which, on August 9, 1965, they did file an Answer to said cross-claim, and on which date the case was "calendared". The case was "called" on February 28, 1966 before the Assistant Pre-Trial Examiner, and the First Notice under Rule 13 (to plaintiff) was sent on July 28, 1966. On August 17, 1966, plaintiffs, by counsel filed a Motion to Remove the case from the Operation of Rule 13, to November 14, 1966, which motion was granted by this Court.

The next docket entry was made on May 15, 1967, reading "Notation of Dismissal (as of 5/14/67) without prejudice." It further appears that no notice thereof was sent to plaintiff's counsel, who had been relying upon the case being automatically

placed on the Ready Calendar as of November 14, 1966, and was awaiting pre-trial notice. It was not until plaintiff's counsel made inquiry as to when the case would be reached for pre-trial that he accidentally discovered the "notation of dismissal (as of 5/14/67) without prejudice", and then moved, on May 13, 1968 to reinstate the action. This was plaintiffs' first and only motion to reinstate, and said motion was granted by the pre-trial examiner on May 29, 1968, with the additional statement "to go on the Ready Calendar as of 8/1/68."

To this Recommendation all four defendants then filed written Objections, which were aired before Judge Sirica on July 5, 1968, on which date he referred the defendants Opposition to the Motion to Reinstate back to the Pre-Trial Examiner "since he did not have a medical report of Dr. Tymeson." The file does show that attached to the Memorandum of Points and Authorities in support of the defendants Opposition, there is a photo-copy of a letter dated June 16, 1968 from a Dr. Glenn W. Tymeson concerning the then alleged physical condition of the defendant Bonham. This letter was not sworn to, and it appears that on August 13, 1968, defense counsel simply copied the letter of June 16, 1968, and had it sworn to by the said doctor before a Notary Public in Broome County, New York.

The next docket entry is dated September 3, 1968, and reads: "Recommendation of Pre-Trial Examiner denying Motion to Reinstate" and the aforesaid Affidavit of August 13, 1968 was then filed.

Counsel for plaintiffs received no notice of any hearing before the Pre-Trial Examiner for September 3, 1968, and, this being his original motion, he most certainly would have appeared to bolster same. On receiving copy of the Pre-Trial Examiner's Recommendation denying Plaintiffs' Motion to Reinstate, he then promptly filed the present Objections to Pre-Trial Examiners' Recommendation.

The court jacket, and the docket, will indicate that all three of the individual operators involved in this collision have been deposed - the individual defendants being deposed by plaintiffs' counsel on March 15, 1965 - and the plaintiff being deposed by defense counsel on May 17, 1965. In addition to said oral deposition, the defendants had had preliminary discovery from plaintiff by written Interrogatories filed on April 13, 1965 and promptly answered by plaintiff within 14 days thereafter, on April 27, 1965.

If, as the aforesaid medical affidavit indicates, the defendant Bonham is too ill to attend trial, his deposition could be used in lieu of his personal testimony. However, in any event, no prejudice could ensue to the remaining three defendants, as they can use the said deposition of the defendant Bonham, under the Federal Rules of Civil Procedure, "for any purpose".

Wherefore, in view of the foregoing facts, and following statement of Authorities, and the attached Affidavit of plaintiffs' counsel, it is respectfully submitted that upon reconsideration hereof, the Court should Overrule the Recommendation of the Pre-Trial Examiner, and reinstate this cause to the Pre-Trial and Ready Calendars.

AUTHORITIES

In - NELSON V. AMERICAN STORE FIXTURE CO. (D. C. Mun. App.) (1956) 119 A.2d 445, a judgment for plaintiff was affirmed on appeal, where the trial court had refused to dismiss for alleged failure to diligently prosecute, where an interlude of sixteen (16) months had existed between the issuance of the 3rd and 4th summons, defendant claiming that he had been available in the District all of that time for service of process.

In - EDMUNDS v. FRANK B. JELLEFF, Inc. (D. C. Mun. App.) (1956) 127 A.2d 152, the appellate court upheld the denial of a dismissal for want of diligent prosecution, in a case where the case had laid dormant for 17 months, the Court pointing out that "there was no indication that the defendant was prejudiced by the delay."

In - RANKIN V. SHAYNE BROS., INC., 108 U.S. App. D.C. 47, 280 F.2d 55 (1960), the U.S. Court of Appeals reversed Judge Holtzoff for having granted a motion to dismiss for lack of diligent prosecution in a case where there had been no action from Nov. 2, 1956 to July, 1959 on which date the defense moved to dismiss. This case had previously gone to the U.S. Court of Appeals from a directed verdict for defendant, which was reversed. In this case, it was represented to the Court that the truck driver and his helper, who had been witnesses in the prior trial, had disappeared and could not be found. Although Judge Danaher had dissented to the reversal, he stated - "I would narrowly condition the reversal" and "I would limit proof as to the issue of liability to that established on the record already made." In this case the collision giving rise to the litigation had occurred on Jan. 3, 1951.

In - LYFORD V. CARTER, 274 F.2d 815, 816 (2 Cir., 1960), the Second Circuit Court of Appeals, in considering the outright dismissal of an action, stated - " * * under the circumstances the doom entered below seems altogether too final and definitive. We think the action should take the more normal course of ordinary pleading and disposition in ways less abrupt."

This subject was again considered by our court of last resort, in L.P. STEUART, INC. V. MATTHEWS, 117 U.S. App. D.C. 279, 329 F.2d 234 (1964), cert denied 379 U.S. 824, 85 S. Ct. 50, 13 L. Ed. 2d 35, wherein Judge Walsh, of this Court, had reinstated an action some 2 years after it had been dismissed. The accident therein involved had occurred on Feb. 7, 1957. The suit was not filed until Feb. 5, 1960, just two days before the Statute of Limitations would have run. On Oct. 19, 1960 the case was dismissed without prejudice for failure to prosecute. Over two years later, on October 22, 1962, a motion was filed, by new counsel, to reinstate the action. In the opinion, written by Justice Edgerton, it was pointed out that original counsel had been beset by personal problems, including his own wife's illness, and it was there held that there had been no abuse of discretion.

In - JONES V. ROUNDTREE (D.C. App.), 225 A.2d 877 (1967), the appellate court reversed the then Chief Judge, Hon. John Lewis Smith, Jr. (now U.S. District Judge), for having dismissed an action for alleged want of diligent prosecution, the Court stating - "We are, hesitant, however, to visit the sins of an attorney on his client."

And just as late as October 24, 1968, in - CHRISTIAN V. BRUNO, (D.C. App.) 247 A.2d 54, the D.C. Court of Appeals reversed Judge Malloy, of D.C. General Sessions, in a case questioning the dismissal of an action for alleged lack of diligent prosecution under GS Rule (Civil) 41 (b), which is very analagous to Local Civil Rule 13 of the U.S. District Court. In an unanimous opinion written by Judge Kelly, she stated: "In short, it is our view that mere passage of time does not justify a dismissal of appellant's complaint with prejudice, still well within the period of limitations, at a time when appellants were seeking to expedite the case, despite the substantial period of delay."

Other jurisdictions have similarly held. In MANSON V. FIRST NATIONAL BANK, 366 Pa. 211, 77 A.2d 399, 402, the court stated: "Nor will the plaintiff be penalized for laches if his delay has not resulted in injury to his adversary."

See also, - FORNERIS V. KRELL, 69 Cal. App. 2d 280, 158 P.2d 937.

Respectfully submitted,

/s/ Earl H. Davis,
Of Counsel for Plaintiffs,
810-18th Street, N.W.
Wash., D.C. 20006.

[Certificate of Service]

[Filed 12-18-68]

AFFIDAVIT OF WARREN E. MILLER, ESQ.,
IN SUPPORT OF MOTION TO RECONSIDER, ETC.

DISTRICT OF COLUMBIA, SS:

Warren E. Miller, being first duly sworn according to law, on oath deposes and says as follows:

That he has been counsel for the plaintiffs in the above action since the inception thereof; that he prepared and filed the Complaint, arranged for the undertaking of the plaintiff as a non-resident, deposed the individual defendants herein, and attended the pre-trial deposition of plaintiff in the office of defense counsel.

That he has only received one Notice of proposed dismissal of this action, under Rule 13 of the local rules of this Court, on receipt of which he moved to Remove the action from the Operation of Rule 13 to November 14, 1966, which motion was granted by Judge Corcoran of this Court. He assumed that the case would then, as of November 14, 1966, automatically be placed on the Pre-Trial Calendar. When he had received no Notice of Pre-Trial up to May, 1968, he first discovered, upon making inquiry, that the action had been dismissed ("as of 5/14/67"), although he had received no other Notice of such proposed action pursuant to Rule 13. He then, on May 13, 1968, filed the ONLY Motion to Reinstate same. This Motion was originally granted by the Pre-Trial Examiner on May 29, 1968, with the additional notation "to go on Ready Calendar as of 8/1/68." To this the defendants Objected,

and on hearing before Judge Sirica, on July 5, 1968, the Opposition to Reinstatement was referred back to the Pre-Trial Examiner. Affiant received no notice of any hearing thereon for September 3, 1968, and upon learning by mail of the action there taken, promptly filed his Objections to the Recommendation.

/s/ Warren E. Miller

Subscribed and sworn to before me this 16th day of December, 1968.

/s/ Louis Morowitz

[Filed 12-31-68]

OPPOSITION OF DEFENDANT, BONHAM, TO MOTION TO RECONSIDER PLAINTIFF'S OBJECTIONS TO RECOMMENDATION OF PRETRIAL EXAMINER AND RULING MADE THEREON

Comes now the defendant, Gerald C. Bonham, by his attorney and opposes the motion to reconsider plaintiff's objections to recommendation of pretrial examiner and the ruling made thereon of November 27, 1968, and to thereafter sustain plaintiff's objections and reinstate this cause to the Ready Calendar for the following reasons:

1. Ample opportunity has been afforded for a full hearing and a ruling has been made by this Honorable Court. Matters which would have a significant bearing in allowing the Court to exercise its discretion have been submitted to the Court.

2. While the passage of time alone is not asserted as the basis for opposition, there has been no showing of diligence in prosecution nor has any excuse for the lack of diligence in

prosecution by the plaintiff have been given, other than no notice was received of action under Rule 13, and no notice of hearing for September 3, 1968 was received.

3. Since notice for dismissal under Rule 13 was received by counsel for all defendants, it seems that it is a reasonable assumption that notice was also mailed to counsel for the plaintiff. A motion by the plaintiff to remove the case from the operation of Rule 13 was granted and the order gave a specific time for its expiration. This order itself should constitute sufficient notice that after November 14, 1966, the case would again be within the operation of Rule 13.

The hearing before the pretrial examiner of September 3, 1968 was originally set for August 2, 1968. On this date, counsel for the plaintiffs, as well as counsel for the defendants, attended in the office of the pretrial examiner. Counsel for the plaintiffs presented a Motion to Strike the unsworn statement of Dr. Glenn W. Tymeson. Thereafter, counsel for plaintiffs asked for a continuance of the hearing. This was granted. Notice of this hearing, reset for September 3, 1968, was received by counsel for all defendants.

4. The health of the defendant, Gerald C. Bonham, precludes his cooperation in offering a defense on his own behalf. This defendant takes daily medication and his physician has given his sworn statement that this defendant's appearance and the act of testifying in Court would be detrimental to his health. The defendant has been under treatment since April 14, 1968. The delay has greatly prejudiced him.

For the reasons listed above, the defendant, Gerald C. Bonham, asks that the plaintiffs' motion to reconsider be denied.

/s/ BERNARD J. HARIG for Defendant
Gerald C. Bonham
740 Washington Building
Washington, D.C. 20005
STerling 3-5377

[Filed 12-31-68]

MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION TO RECONSIDER

Comes now the defendants, Walter Anson Butler, Cavalier Moving and Storage Company, a Corporation, and North American Van Lines, Inc., a Corporation, by and through their attorneys, and in opposition to the motion to reconsider say that the accident which gave rise to this cause of action occurred on December 22, 1961. Suit was not filed until December 16, 1964, almost three years after the date of the accident. The case was at issue, the complaint and cross-claims having been answered by August of 1965. All discovery proceedings had been completed by May 17, 1965. Nonetheless, when this case came on for the call of the calendar on February 28, 1966, over nine months after the last discovery proceedings were completed and over fourteen months after the suit was filed, plaintiffs' counsel indicated that he was not ready for the case to be certified to the ready calendar.

Thereafter, nothing was done by the plaintiffs to undertake any further discovery proceedings nor to have the case certified. On August 3, 1965, over five months after the calendar call and over twenty months after the suit was filed, the Clerk of the Court sent to all counsel a postcard indicating that ". . . it appears from the record that no action has been taken by you to prosecute your claim in this cause and that your claim will stand dismissed under the provisions of Rule 13 of this Court unless action be taken within the six month period provided."

Subsequent to receipt of that postcard, the plaintiffs prepared and filed a motion" . . . to remove the cause from the operation of Rule 13 to and including November 14, 1966," and on August 16, 1966, Judge Corcoran entered an order which was prepared by counsel for the plaintiffs, which stated that ". . . Rule 13 of this Court is hereby suspended to and including November 14, 1966."

Following the entry of that order the plaintiffs still did nothing by way of discovery not did they do anything to have the case certified to the ready calendar, and in May, 1967, there was entered on the docket by the Clerk of the Court a notation that the cause was dismissed without prejudice for failing to prosecute and that this entry was effective as of May 14, 1967. A copy of this notification was sent to all counsel.

It was not until one year later, May 13, 1968, that the plaintiffs filed a motion to "reinstate the case". This motion came on for hearing before the pre-trial examiner and after consideration the pre-trial examiner recommended that the cause be reinstated and placed on the ready calendar as of August 1, 1968.

Objections were filed by the defendants to the pre-trial examiner's recommendations and the objections came on for hearing before Judge Sirica. After argument Judge Sirica remanded the motion to reinstate to the pre-trial examiner with instructions to reconsider his recommendations in the light of the medical report that one of the defendants was not physically capable of appearing for trial.

On September 3, 1968, the motion to reinstate came on for hearing before the pre-trial examiner, at which hearing the plaintiffs' counsel did not appear, and upon consideration of the additional evidence, as well as all the facts in the case, the pre-trial examiner changed his recommendations and recommended to the Court that the motion to reinstate be denied.

Objections were then filed by plaintiffs' counsel to these recommendations and this Court entered an order on December 11, 1968, adopting the recommendations of the pre-trial examiner and denying the motion to reinstate.

Counsel for the plaintiffs, in his present motion to reconsider the Court's order of December 11, 1968, states that he was relying upon the case being automatically placed on the ready calendar as of November 14, 1966, and that is the reason that he never certified it to the ready calendar. The record will show, however, that there was no basis for this reliance since he was the one who prepared the order and submitted it to the Court and which was signed by the Court on August 16, 1966. The wording of that order, which counsel for the plaintiffs himself prepared, states specifically that Rule 13 of this Court is suspended to and including November 14, 1966.

There is nothing in the order which would lead anyone to believe that the case would be automatically certified to the ready calendar as of that date. Counsel for the plaintiffs asked that Rule 13 be suspended and this was the relief which he was granted.

Furthermore, counsel for the plaintiffs states that he did not receive a copy of the notice of dismissal in May, 1967, but learned of it a year later, purely by accident. He also states that he received no notice of the hearing before the pre-trial examiner on September 3, 1968, but the record clearly shows that all counsel were notified and this counsel received notices to the effect that the case was dismissed in May, 1967, and also that the plaintiffs' motion to reinstate was set for hearing on September 3, 1968.

Counsel for the plaintiffs says that the defendants are not prejudiced by the delay in bringing this litigation to trial, even though the defendant Bonham is too ill to personally attend trial, because the defendant Bonham's testimony could be introduced by means of his deposition. Most certainly the defendants are prejudiced for the reading of his deposition is no substitute for a live witness. The jury cannot see, hear and evaluate the witness for themselves. Furthermore, the defendant is forced to present his testimony through questions asked him, not by his own attorney on direct examination in the normal manner but through questions put to him by opposing counsel during the course of a discovery proceeding, which questions amount to cross-examination of the witness without the benefit of any redirect examination of his witness.

It is submitted that the defendants are prejudiced by this type of presentation and further the prejudice is a creature of the plaintiffs own making and he should not be entitled to benefit from it at the expense of the defendants.

In addition, the defendants are further prejudiced in that it has been ascertained that one of the witnesses, Earl B. King, whom the defendants intended to have testify, has died during the pendency of these proceedings, and that another witness, John Thatcher, has moved from the area and his present address is unknown.

On each occasion that the plaintiffs were required to act they have either failed to do anything or waited until the last minute to do so. He excuses his inaction of non-appearance by alleging that he did not receive any notice; whereas, all other counsel in this case received the required notices.

It is obvious that the plaintiff is not interested in diligently prosecuting his claim. It took him almost three years to file suit and after the case was at issue he continued to delay in placing it on the ready calendar with the result that it was subsequently dismissed. If the plaintiff was as vigorous in bringing the case to trial as he has been in trying to set aside the dismissal, the trial would have been long since completed, but because of the lack of diligence one defendant is unable to appear due to illness, one witness has died and another is missing. The defendants have been greatly prejudiced.

The plaintiff has never given any reason why he continued to delay the prosecution of this claim. It was at his specific request on two occasions that the case was kept from being placed on the ready calendar and ultimately being tried. The only

conclusion that can be drawn is that the plaintiff was merely procrastinating. As a result of his procrastination the defendants have been prejudiced, and it is submitted that the motion to reconsider should be denied.

DOHERTY, ATTRIDGE & DOHERTY

/s/ Patrick J. Attridge
1010 Vermont Avenue, N.W.
Washington, D. C. 20005
NAtional 8-6257
Attorneys for defendants 2, 3 and 4

[Certificate of Service]

[Filed 12-24-68]

ORDER

Upon consideration of the motion to reconsider plaintiffs' objections to recommendation of Pretrial Examiner and the ruling of Nov. 27, 1968 filed herein, December 18, 1968, it is this 30th day of December, 1968,

ORDERED that the motion be and the same hereby is denied.

ROBERT M. STEARNS, Clerk

HOWARD F. CORCORAN
Presiding Judge

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 22,700

JOSEPH M. BARNA, JR. and GALE D. BARNA

Appellants

vs.

GERALD C. BONHAM, WALTER ANSON BUTLER,
CAVALIER MOVING & STORAGE CO., INC.,
NORTH AMERICAN VAN LINES, INC.

Appellees

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLEES, WALTER ANSON BUTLER, CAVALIER MOVING & STORAGE CO., INC. AND NORTH AMERICAN VAN LINES, INC.

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Washington, D. C. 20005

Of Counsel:

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1010 Vermont Avenue, N. W.
Washington, D. C. 20005

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TABLE OF CASES

Cases or authorities chiefly relied upon are marked by asterisks.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the trial Court abuse its discretion in refusing to reinstate the

ntiffs' cause of action after it had been dismissed for failure to prosecute?

This case has not previously been before this Court under the same or
similar title.

STATEMENT OF THE CASE

The appellants, plaintiffs below, are husband and wife. The male plaintiff brought this action for damages for personal injuries arising out of an automobile accident that occurred on December 22, 1961. The female plaintiff's claim was for loss of consortium.

Suit was filed against the appellees, defendants below, on December 16, 1964. The defendant, Bonham, was the operator of an automobile which allegedly stopped suddenly in front of the plaintiffs' vehicle and the defendants Butler, Cavalier Moving and Storage Company and North American Van Lines, Inc., are the operator and lessee and lessor of the vehicle which allegedly collided with the rear of plaintiffs' vehicle.

Answers to the complaint were filed on behalf of the defendants, Butler, Cavalier Moving and Storage Company and North American Van Lines, Inc. on January 14, 1965, and an answer, as well as a cross-claim was filed on behalf of the defendant Bonham on January 21, 1965. Thereafter, the depositions of the defendant operators were taken by the plaintiff on March 15, 1965, and interrogatories were sent to the plaintiff on April 13, 1965; the answers to which were filed on April 27, 1965. On May 17, 1965, the deposition of the male plaintiff was taken by the defendants.

In July of 1965, it was learned that the defendants, Cavalier Moving and Storage Company and North American Van Lines never answered the cross-claim of the defendant, Bonham, and this answer was filed on August 1965. Thus, on August 9, 1965, the case was at issue.

Nothing further was done by the plaintiffs to prosecute their claim and on February 28, 1966, the case came on for calendar call before the

pre-trial examiner. At this time the case was merely treated as "called" with the admonintion that Local Rule 13 became effective.

On August 2, 1966, counsel for the defendants, Butler, Cavalier Moving and Storage Company and North American Van Lines, received a post-card from the Clerk of the Court indicating that the claim was to stand dismissed unless action be taken within the six month period provided by Rule 13.

On August 17, 1966, almost six months after the initial calendar call, since which time nothing had been done by the plaintiffs either in the way of discovery or to prosecute their claim, the plaintiffs filed a motion for an order removing the case from the operation of Local Rule 13 to and including November 14, 1966.

On August 18, 1966, Judge Corcoran signed an order to that effect which was prepared and presented to him by the plaintiffs.

Thereafter, the plaintiffs again undertook no discovery nor did they do anything to prosecute their claim and on May 17, 1967, counsel for the defendants, Butler, Cavalier Moving and Storage Company and North American Van Lines, received a notice from the Clerk of the Court stating that the cause stood dismissed for failure to prosecute as of May 14, 1967.

One year later, on May 13, 1968, the plaintiffs filed a motion to reinstate their cause of action and the defendants filed their opposition to the same on May 21, 1968.

At a hearing the pre-trial examiner recommended that the motion to reinstate be granted. The defendants filed an opposition to the pre-trial

examiner's recommendation on the grounds that all the defendants had been prejudiced by the plaintiffs' dilatory tactics and failure to prosecute their claim in that at least one of the eye witnesses had died during the course of the proceedings and that the defendant Bonham, who resided near Binghamto New York, was unable to physically attend any trial since he was under the care of a physician for hypertensive cardiovascular disease with arterio-sclerotic changes involving the heart and cerebral blood vessels, as well as emphysema accompanied with dizziness, headaches and loss of memory. Th physician further instructed the defendant Bonham not to travel and to avoid emotional disturbances.

The defendants' opposition to the recommendations of the pre-trial examiner were accompanied by a medical report from Dr. Glenn W. Tymes setting forth the above medical information regarding the defen dant Bonham.

This opposition came on for hearing before Judge Sirica, at which time Judge Sirica inquired whether or not the pre-trial examiner had had the benefit of a copy of Dr. Tymeson's report at the time he made his recommendations, and upon learning that the pre-trial examiner did not have the benefit of this report the Court entered an order on July 15, 1968, referring the motion back to the pre-trial examiner for reconsideration in the light of the medical report.

The motion for reconsideration was calendared for hearing before the pre-trial examiner on July 19, 1968, and continued for hearing on Augus 2, 1968. On the latter date, counsel for all the parties appeared and counse for the plaintiffs objected to the pre-trial examiner considering the medical

eport of Dr. Tymeson because it was not under oath. On that date the laintiffs also filed a written opposition to strike the statement of Dr. Tymeson nd handed copies of this written opposition to counsel for the defendants. The aid motion stated as follows:

"Motion to Strike Statement of Dr. Glenn W. Tymeson

"Plaintiff moves the Court to strike the unsworn statement of Dr. Glenn W. Tymeson.

Warren E. Miller

"I certify a copy of the foregoing was handed to counsel for defendant this 2nd day of August, 1968.

Warren E. Miller
Attorney for Plaintiff"

Whereupon, the pre-trial examiner continued the hearing of the otion until September 3, 1968, in order that the affidavit of Dr. Tymeson ould be obtained, and also to give the plaintiffs an opportunity to take the octor's deposition should they so desire. On August 22, 1968, counsel for the efendants, Butler, Cavalier Moving & Storage Co., and North American Van ines, Inc., received a postcard from the Clerk of the Court indicating that e motion to reinstate was set for hearing before the pre-trial examiner at 20 A.M. on September 3, 1968.

On September 3, 1968, counsel for the plaintiffs failed to appear for e hearing and the affidavit of Dr. Tymeson was presented to the pre-trial xaminer. Upon consideration of all the facts in the case, as well as the ffidavit of Dr. Tymeson, the pre-trial examiner found that the defendants might e prejudiced and recommended that the motion to reinstate be denied.

Six days later, on September 9, 1968, the plaintiffs filed objections to the pre-trial examiner's recommendation and these objections were set for hearing before Judge Corcoran on October 24, 1968, and then continued, at the plaintiffs' request, until November 27, 1968. At the hearing on Novem ber 27, 1968, Judge Corcoran affirmed the recommendations of the pre-trial examiner denying the plaintiffs' motion to reinstate and entered an order to that effect on December 11, 1968.

One week later, on December 18, 1968, the plaintiffs filed a motion to reconsider and the Court, on December 30, 1968, denied that motion to reconsider.

ARGUMENT

The plaintiffs have spent much time critizing and attacking the mer of Local Rule 13, but the fact remains that it is and was a rule of Court and further, that it was not complied with by the plaintiff. It is submitted that t purpose of the rule is two-fold; first, to bring about the speedy disposition of civil cases on their merits by forcing counsel to proceed promptly in ord that cases will be actually ready for trial; and, secondly, and conversely to summarily dispose of those cases which counsel do not desire to litigate.

As the Supreme Court said in the case of Link v. Wabash Railroad Company, 370 U. S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734, (1962) at pages 6 and 630, in 370 U. S., and page 1388 in 82 S. Ct., "The authority of a fede tri al Court to dismiss a plaintiff's action was prejudice because of his failu to prosecute cannot seriously be doubted. The power to invoke this sanctio

is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts."

After attacking Rule 13 the plaintiffs allege that they never received notice of any warning of the proposed dismissal as provided by Rule 13, and, therefore, it was necessary that they resort to Rule 60 (b) of the Federal Rules of Civil Procedure which provides for relief from a judgment or order of the Court.

Counsel for the defendants, Butler, Cavalier Moving & Storage Company and North American Van Lines, Inc., received a notice of the proposed dismissal under Rule 13 in August of 1966, and it is assumed that counsel for the plaintiffs also received such a notice because a short while thereafter he filed a motion to stay the operation of the rule.

Counsel for the defendants, Butler, Cavalier Moving & Storage Company and North American Van Lines, Inc., also received a notice of the dismissal in May of 1967, and it is presumed that counsel for the plaintiffs likewise received this notice since he received the first notice in August of 1967. Even if he did not he had constructive notice since he specifically requested and prepared the order that was signed by the Court on August 18, 1966, staying the operation of the rule until November 14, 1966. Therefore, he knew that the maximum time that he would have to comply with the rule would be six months from November 14, 1966; i.e., May 14, 1967. Therefore, we know that the plaintiffs received that notice.

We must keep in mind, however, that the plaintiffs' claim was not denied reinstatement because of the untimeliness of his motion under Rule 60

(b) but because of the fact that the delay occasioned by his failure to diligentl prosecute his claim has resulted in undue prejudice to the defendants in the presentation of their defense to this action. Therefore, the sole issue in thi case is did the trial Court abuse its discretion in refusing to vacate an order which dismissed the plaintiffs' action because of their failure to prosecute.

A review of the record and facts before the trial Court will reveal that this suit was filed about one week short of three years after the accident occurred. Within six months after the suit had been filed all discovery had been completed by both sides. Thereafter, nothing was done by the plaintiffs to certify the case as ready for trial. On February 28, 1966, over four year after the accident had occurred, over fourteen months after suit had been fi and over nine months after discovery proceedings had been completed, the case came on for calendar call. At this time all counsel were present and t case was merely treated as "called". All counsel were advised that under the rules the plaintiff had six months from that date in which to certify his case as ready for trial.

On August 2, 1966, counsel for the defendants, Butler, Cavalier Moving & Storage Company and North American Van Lines, Inc., received a postcard from the Clerk warning that the case would stand dismissed unless action be taken. On August 17, eleven days short of the six month period for taking action, the plaintiffs filed a motion to remove the case fr the operation of Rule 13 to and including November 14, 1966. Therefore, know that the plaintiffs received that notice. The plaintiffs did not assign any reason whey they were not prepared at any time, over four and one-ha

years after the accident, over one and one-half years since the suit was filed and over thirteen months since the last discovery proceedings were had, to certify the case as ready for trial. There being no opposition to this motion the plaintiff prepared and presented an order to Judge Corcoran which was signed on August 18, 1966. Again the case relegated to limbo by the plaintiff.

November 14, 1966, came and went and nothing was done. Plaintiffs' counsel certainly was aware of the existence of Rule 13, as well as its consequences. He was further aware that if the rule was strictly construed by the Court his case should have been dismissed on November 14, 1966, the date selected by him since that date extended the time in which he was to take action from six months as provided by the rule to nine months. Nonetheless, the Court liberally construed Rule 13 and reset the clock, so to speak, so that the six month period began to run as of November 14, 1966. Still nothing was done to prosecute the claim and on May 17, 1967, over five and one-half years after the accident, over two and one-half years after suit was filed and over two years since the last discovery proceedings, the case was dismissed as of May 14, 1967, for failure to prosecute.

Almost one year later, during which time the plaintiff again did nothing, the plaintiff filed a motion to reinstate alleging that he did not receive notice of the dismissal and that he learned of it while making a review of the Court file (App. 7). It is interesting to observe at this point that Rule 60 (b) 1) of the Federal Rules of Civil Procedure requires that motions to relieve a party of a final judgment or order due to mistake, inadvertence, surprise or excusable neglect shall be made not more than one year after the

judgment or order was entered or taken. Again by sheer coincidence the plaintiffs got in under the wire. The defendants filed an opposition to this motion and at the hearing the pre-trial examiner was advised that one of the witnesses relied upon by the defendants, Butler, Cavalier Moving & Storage Company and North American Van Lines, Inc., had died and also that the defendant Bonham was in ill health. However, counsel for the defendants did not know at that time the seriousness of Bonham's condition and the pre-trial examiner recommended that the motion to reinstate be granted.

Subsequent to that recommendation, the medical report of Dr. Tymeson was received and attached to the opposition of the defendants to the recommendation of the pre-trial examiner. After review by the examiner at hearing on September 3, 1968, notice of which counsel for the plaintiffs says he did not receive, the pre-trial examiner changed his recommendations to the motions' judge suggesting that the motion to reinstate be denied.

Throughout these proceedings it is evident that the defendant have done nothing to obstruct the speedy disposition of this case. The defendants were at all times ready for trial since May of 1965. The delays have been occasioned solely by the actions or inactions of the plaintiffs and have now resulted in undue prejudice to the defendants in the presentation of their case due to the inability of one of the defendants to testify and the death of a witness.

The filing of the suit was delayed until the last possible week, the filing of the motion to reinstate was delayed until the last possible day. In between these times delays were sought by the plaintiffs for no reason what-

oever. The whole history of this case is delays brought about solely by the laintiffs and their counsel.

No reason has been advanced by the plaintiffs why this case could not ave been certified ready for trial in May of 1965, four years ago. The fact s they were not interested in prosecuting this case and have never been in- erested in prosecuting it.

By his own account counsel for the plaintiffs did nothing to inquire bout the status of the case from the time his order was signed on August 18, 966, until twenty-one months later in May of 1968, when he states he first earned of the dismissal following a review of the Court file. Certainly there ests upon counsel, as well as the parties to litigation, the obligation to miliarize themselves with and to inquire about the status of their litigation. o facts were presented to the trial Court that the plaintiffs themselves had quired of their counsel regarding the status of the case and were misled by m, as was the situation in L. P. Steuart, Inc. v. Matthews, 117 U. S. App. C. 279, 329 F. (2d) 234 (1964), Certiorari denied 85 S. Ct. 50, 379 U. S. 24, 14 L. Ed. 2d 35.

It is evident that the plaintiffs themselves were not interested in this tigation. There being no showing or allegation to that effect, the parties most rtainly are bound by the actions or inactions of the attorney whom they chose represent them.

"Petitioner voluntarily chose this attorney as his representative in the tion, and he cannot now avoid the consequences of the acts or omissions this freely selected agent. Any other notion would be wholly inconsistent

with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' Smith v. Ayer, 101 U. S. 320, 326, 25 L. Ed. 955." Link v. Wabash Railroad Company, supra, at pages 633, 634, 370 U. S. and page 1390, 82 S. Ct.

In a factual situation as has been disclosed here, the plaintiffs should not be permitted to take unfair advantage when their dilatory tactics have created a condition which results in manifest prejudice to the defendants. The finding of the trial Court that the defendants have been highly prejudiced is substantially supported and there have been no facts presented by the plaintiffs showing an abuse of the discretion on the part of the trial Court.

CONCLUSION

It is respectfully submitted that upon the facts of this case the trial Court did not abuse its discretion in refusing to reinstate the plaintiffs' cause of action after it had been dismissed for failure to prosecute and that the trial Court's finding that to vacate the dismissal would be highly prejudical to the defendants is amply supported by the record and that the judgment of the trial Court should be affirmed.

Respectfully Submitted

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Cavalier Moving & Storage
Company and North American
Van Lines, Inc.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,700

JOSEPH M. BARNA, JR.
and
GALE D. BARNA,
Appellants,

v.

GERALD C. BONHAM,
WALTER ANSON BUTLER,
CAVALIER MOVING & STORAGE CO., INC.,
NORTH AMERICAN VAN LINES, INC.,
Appellees.

Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLEE BONHAM

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783-5377

Attorney for Appellee Bonham

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Appellees.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE BONHAM

STATEMENT OF ISSUE PRESENTED

In the opinion of appellee Bonham, the following issue is presented:

Whether the trial court properly used its inherent power, in the exercise of sound discretion, in upholding the dismissal of plaintiffs' case, for want of prosecution, in view of (a) the protracted delays of plaintiffs which caused undisputed prejudice to defendants and

(b) failure of plaintiffs' counsel to comply with the rules of the court.

This case has not previously been before this court.

COUNTERSTATEMENT OF THE CASE

I

Gerald C. Bonham, Appellee No. 1 in this case, was en route to his home in New York State on December 22, 1961. He was driving his car in an easterly direction on New York Avenue, N.E., in the District of Columbia and made a left turn at the intersection of New York Avenue with Bladensburg Road, N.E., from a left-turn lane. Bonham then made a right hand turn into a gas station driveway. A collision occurred between two trucks which were travelling to the rear of Bonham.

Suit was filed in the United States District Court for the District of Columbia on December 16, 1964, by Jospeph M. Barna, Jr. and Gale D. Barna, where it was alleged that Bonham was negligent. He was named as a defendant along with Defendant No. 2, Walter Anson Butler; Defendant No. 3, Cavalier Moving and Storage Company; and Defendant No. 4, North American Van Lines, Inc. All of the defendants in this 1964 action are appellees in this case.

A cross-claim was filed by Bonham for contribution against the other defendants, which they answered. During 1965, interrogatories were filed and answered and depositions were taken. The case was calendared on August 9, 1965. Almost one year later, first notice was given under Local Rule 13.

On August 17, 1966, counsel for plaintiffs Barna, filed a Motion to remove the case from the operation of Rule 13 to November 14, 1966. This date was selected by plaintiff's counsel and is listed in his Motion so that the stay would be until that date,

after which, Rule 13 would again be operable. This Motion contained no request that the case be certified ready after the date selected.

There being no further activity, the cause was dismissed under Rule 13 as of May 14, 1967. Notice of dismissal was received by counsel for Bonham and by counsel for the other defendants.

II

On May 13, 1968, counsel for the plaintiffs filed a motion to reinstate. This motion was granted by the Pre-Trial Examiner on May 29, 1968. All of the defendants through counsel filed an Objection to the Recommendation of the Pre-Trial Examiner. Defendant Bonham based his opposition on the time lag and the consequent prejudice to him caused by the delay since his health would no longer allow for a vigorous defense.

In a hearing before Judge Sirica on July 5, 1968, it was determined that the Pre-Trial Examiner did not have the advantage of medical information contained in a letter from Dr. Glenn W. Tymeson of Lisle, New York, dated June 16, 1968. This letter reported the physical condition of Defendant Bonham. It expressed the opinion that Bonham should restrict his activities and stated that the act of testifying in court would be detrimental to his health. Judge Sirica thereupon referred the case to the Pre-Trial Examiner.

On August 2, 1968, this additional hearing was scheduled to be heard by the Pre-Trial Examiner. Counsel for all parties appeared on this date. Counsel for plaintiffs presented a written motion to strike the unsworn statement of Dr. Glenn W. Tymeson on this date. Also, counsel for plaintiffs requested and obtained a continuance of that hearing.

III

Counsel for Bonham received notice and attended a hearing before the Pre-Trial Examiner on September 3, 1968. Present at this hearing were counsel for the other three defendants. Counsel for plaintiff was absent. An affidavit from Dr. Glenn W. Tymeson was submitted and filed with the court. This affidavit was the report given by Dr. Tymeson in his letter of June 16, 1968, in affidavit form to satisfy plaintiffs' objections. The Pre-Trial Examiner recommended that the motion to reinstate be denied.

Objections to the recommendation of the Pre-Trial Examiner were next filed by plaintiffs on September 9, 1968. Oppositions were filed by all defendants and a hearing set for October 24, 1968 was continued to November 27, 1968.

On November 27, 1968, Earl H. Davis, Esq., appeared for the plaintiffs in a Hearing before Judge Corcoran. The Court upheld the recommendation of the Pre-Trial Examiner and denied the motion to reinstate. The court exercised its discretion after having had ample opportunity to consider the total circumstances of the case. Judge Corcoran called the delay highly prejudicial to the defendants and noted the consequences in loss of witnesses where the plaintiff does not press his suit in the passage of seven years.

Plaintiffs, through counsel, filed a motion to reconsider. Judge Corcoran denied it and plaintiffs, through counsel, filed a Notice of Appeal.

ARGUMENT

THE TRIAL COURT PROPERLY USED ITS INHERENT POWER, IN THE EXERCISE OF SOUND DISCRETION, IN UPHOLDING THE DISMISSAL OF PLAINTIFFS' CASE, FOR WANT OF PROSECUTION, IN VIEW OF (a) THE PROTRACTED DELAYS OF PLAINTIFFS WHICH CAUSED UNDISPUTED PREJUDICE TO DEFENDANTS AND (b) FAILURE OF PLAINTIFFS' COUNSEL TO COMPLY WITH THE RULES OF THE COURT

A basic axiom of the judicial process is that justice delayed is justice lost. A corollary is well expressed by the Supreme Court in *Ackermann v. United States*, 340 U.S. 193, 198 (1940), where it said that there "must be an end to litigation someday."

These doctrines play a vital role in the appellate review of a trial court's dismissal of a case for lack of prosecution. The focal inquiry is the presence or absence of abuse of the judge's discretion. In the light of these guidelines, appellate courts have many times upheld the dismissal of cases for the delays of plaintiffs in processing their claims.

A leading case is *Sweeney v. Anderson*, 120 F.2d 756 (8th Cir. 1942). This was an action in the Kansas federal court by a nonresident. He was promptly notified of the death of his Kansas counsel and 81 days then intervened between the death and the trial date. The plaintiff did not appear for the trial, and the absence of his nonresident attorney at each stage of the litigation was unexplained. The court's classic statement of the problem and its rationale in affirming the lower court's judgment of dismissal is applicable to the instant appeal. At page 758 the court said:

> The elimination of delay in the trial of cases and the prompt dispatch of court business are prerequisites to the proper administration of justice. These goals

> cannot be attained without the exercise by the courts of diligent supervision over their own dockets. Court should discourage delay and insist upon prompt dispatch of litigation. Every court has the inherent power, in the exercise of a sound judicial discretion, to dismiss a cause for want of prosecution.

The court further observed (a) that the duty rests upon the plaintiff to use diligence and to expedite his case to a final determination and (b) that an appellant court will not disturb the dismissal of a cause for lack of prosecution unless it appears that the trial judge grossly abused his discretion.

A graphic example of the proper exercise of a trial court's discretion is *Dalrymple v. Pittsburgh Consolidated Coal Company*, 24 Fed. Rules Dec. 260, 2 F R Serv. 2d 41.b 11, Case 7 (W. D. Pa. 1959). This was an action involving personal injuries. Plaintiff's counsel was conversant with the local practice and rules of the federal court and yet he failed to prepare for the prosecution on the docket for three years. He also failed to request an enlargement of the time specified in the order fixing pretrial procedure. The trial court entered a judgment of dismissal for lack of prosecution and for failure to comply with the pretrial rules. In rejecting the argument that plaintiff should not be penalized by dismissal because of the default of her counsel and in denying plaintiff's motion to vacate the judgment of dismissal, the court held that the facts did not meet the necessary requirements to show "mistake, inadvertence, surprise, or excusable neglect . . . or any other reason justifying relief from the operation of the judgment" as provided in Rule 60(b) (1) and (6) of the Federal Rules of Civil Procedure (F.R.C.P.). The court at pages 262-263 said:

> While we are loath to deprive any litigant of the opportunity to have a claim decided on its merits, it

> is our opinion that Rule 5-II and the circumstances of this case make such action both necessary and just. In the circumstances should the judgment be set aside, the court would be participating in the delay which prevents "that promptness of decisions which in all judicial actions is one of the elements of justice." (Quoting *Forsyth v. City of Hammond*, 166 U.S. 506, 513 (1817)

The United States Court of Appeals for the District of Columbia has applied the same doctrine and reached the same result. *Sokolin v. Estes*, 76 U.S. App. D.C. 357, 131 F.2d 351 (1943) was a tort action. After being informed that plaintiff was in another city, his counsel had three months to take his deposition and otherwise prepare for trial. The attorney, however, failed to do so. The Court of Appeals held that the trial judge properly dismissed the suit for want of prosecution. At page 351, the court said: "on this appeal the only points made are that the refusal of the court to authorize the taking of the deposition in Chicago and the court's subsequent order dismissing the case was arbitrary. We think there is no merit to either contention."

The court reached the same result in relation to the counterclaim in *Bridoux v. Eastern Air Lines, Inc.*, 93 U.S. App. D.C. 369, 214 F.2d 207 (1954). The trial judge there dismissed Bridoux's counterclaim against Eastern and entered a default judgment for $160,000 in favor of Eastern against Bridoux. In affirming the dismissal of the counterclaim of Bridoux and reversing the $160,000 judgment against him, the court considered Rule 60(b) F.R.C.P. in relation to the dismissal of Bridoux's counterclaim for damages against Eastern. It held that certain delays in the lawsuit were directly attributable to Bridoux and that therefore his lack of diligence in connection with his counterclaim justified its dismissal.

The Municipal Court of Appeals for the District of Columbia has applied the same doctrines in many cases. Examples are: *Haber v. Goins,* 145 A.2d 452 (1958); *Posin v. Marcus,* 148 A.2d 791 (1959), and *Woods v. Baltimore & Ohio Railroad,* 149 A.2d 425 (1959). All three cases involved appeals from judgments of dismissal for want of prosecution. In *Haber,* the Court said that because of plaintiff's lack of diligence it was unfair to require defendant to defend in 1958 a suit brought in 1954. *Posin* also involved the issue of plaintiff's lack of diligence in pursuing his cause of action. The court held (a) that this was a question of fact for the trial judge and (b) that the granting or denying of a motion to dismiss on this ground rests in his sound discretion. The court observed that as an appellate tribunal, only in an extreme case would it disturb the the trial judge's dismissal based on dilatory tactics of plaintiff. In *Woods* the court at page 425 commented on the many opinions in which courts have stated the rule (a) that a plaintiff must prosecute his action with diligence and (b) that his failure to do so entitles the defendant to demand dismissal.

When deciding whether it should dismiss a case because of the plaintiff's delay in processing his claim, a court must inquire into the matter of prejudice resulting to the defendant. *United States v. Karahalias,* 205 F.2d 331 (2d Cir. 1953) where at page 334 the court was concerned with the possibility that the defendant may have lost some evidence formerly available to him. On this point, the court in *Hicks v. Bekins Moving & Storage Co.,* 115 F.2d 406 (9th Cir. 1940) at page 409 said: "It was not necessary for the defendants to show specific impairment of their defense, because the law will presume injury from unreasonable delay."

Actual prejudice to the defendant was in fact the basis of dismissal in certain cases. One example is *Lanning v. National Savings and Trust Co.,* 2 F.R.D. 149, 5 F.R. Serv. 60b.33, Case 2, (D.C.

D.C. 1941). This case involved suit against an estate and because of inadvertence and oversight of plaintiff's counsel in proceeding with the suit, the clerk of the court dismissed the claim pursuant to the then Rule 24 of the United States District Court for District of Columbia. In upholding this dismissal, Judge Bailey at page 150 said:

> The lack of diligence and knowledge of plaintiff and her counsel would result, if the suit were reinstated, in tying up the settlement of the estate for a period of time far beyond that in which the estate could normally be settled. *I do not think justice would be served by passing over neglect of this kind to the injury of others.* (Emphasis added)

Similarly, in *McCawley v. Fleischmann Transp. Co.*, 10 F.R.D. 624, 14 F.R. Serv. 60b.29, Case 2 (S.D.N.Y. 1950), the court ordered a personal injury suit dismissed for lack of prosecution after plaintiff failed within 90 days to take certain required action. The court said that the lapse of seven years would prejudice the defendant through a loss of proof from certain witnesses.

Rule 13 of the District Court provides for dismissal for failure to prosecute. It clearly, without qualification or exception, requires the plaintiff, when the case is at issue, to take steps within six months thereafter to have the case put on the ready calendar. The risk for failure to do so is dismissal, regardless of absence of warning or notice by the clerk of the court. According to the affidavit of Warren E. Miller, attorney for plaintiffs before dismissal herein, he knew of Rule 13 and the effect of noncompliance.

This case became at issue and was calendared on August 9, 1965. One year later, on August 17, 1966, plaintiffs obtained a stay of Rule 13 to November 14, 1966. From August 9, 1965 to May 13, 1968, neither plaintiffs nor their attorney did anything

according to the record, to prosecute this lawsuit filed on December 16, 1964 and based on an accident on December 22, 1961. Neither plaintiffs nor their counsel have presented to this Court or the District Court any proof of mistake, inadvertence, surprise or excusable neglect or any other reason justifying relief from the operation of the judgment of dismissal. The record is devoid of any plausible or tenable explanation of or justification for their complete inaction from August 19, 1965 to May 13, 1968 in terms of complying with Rule 13.

In the light of the legal doctrines discussed above, the trial court acted properly and used sound discretion in upholding the dismissal of this case for lack of prosecution and for failure to comply with the rules of the trial court. The trial judge and the pretrial examiner were both familiar with the prejudice resulting from plaintiffs' protracted delays in bringing this case to trial. In addition to the fact that memory of events almost seven years old had faded, is the loss of the testimony of one defense witness who had died. Furthermore, defendant, Bonham, had become an infirm man 72 years old and had developed serious heart, lung and circulatory ailments, attended by loss of memory for recent events and by risks associated with exertion or emotional stress. Bonham's attorney filed as a part of the record in this case the affidavit of Bonham's physician, setting forth the patient's condition, as outlined above. Although this affidavit is part of the record on appeal and is shown in docket entries of the District Court as being filed on September 3, 1968, appellants have failed to include it in the appendix to their brief. Appellee Bonham therefore attaches it to his brief at the end as "APPENDIX-BONHAM AFFIDAVIT." Since this affidavit was filed in connection with a pending motion and was not contested or disputed, it is accepted and treated as true. *Farrell v. D. C. Amateur Athletic Union*, 80 U.S. App. D.C. 396, 153 F.2d 647, 648 (1946).

Appellee Bonham is constrained to state that no case cited or discussed in appellants' brief is applicable to the specific situation before the court. Only one case, *Peardon v. Chapman* (Appellants' Brief p. 24), involves an appeal by a plaintiff whose case had been dismissed by the trial judge for lack of prosecution. Absent here was the issue of prejudice to defendants. Moreover, the attorney for plaintiff was not only unexpectedly drawn into another court, but also disabled by illness. Appellants here do not and cannot give the same explanation for ignoring and violating the rules of the court, with consequent prejudice to defendants. *Conley v. Gibson* (Appellants' Brief p. 19) involves dismissal of a suit against a union. The question of prejudice to defendants was not raised. The same comment applies to *Foman v. Davis,* 371 U.S. 178 (Appellants' Brief p. 20). The Court at page 182 observed that there was no prejudice to defendant caused by plaintiff's conduct. *Klapprott v. United States* (Appellants' Brief p. 20) does not involve prejudice to defendant. *Lucas v. City of Juneau* (Appellants' Brief p. 21) does not involve either an appeal by a plaintiff whose case was dismissed by the trial court or prejudice to defendants. *Bridoux v. Eastern Air Lines* (Appellants' Brief p. 21) in fact supports appellees in principle and in result. In that case, the counterclaimant had been guilty of lack of diligence and the trial court dismissed his counterclaim. On appeal, this court affirmed the dismissal. *Williams v. Capital Transit Co.*, (Appellants' Brief p. 21) is not a case of dismissal for want of prosecution. The same comment applies to *Lafferty v. District of Columbia* and *Barber v. Turberville,* (Appellants' Brief p. 22). *L.P. Stewart, Inc. v. Matthews* (Appellants' Brief p. 22) does not involve an appeal by a plaintiff whose case was dismissed by the trial judge. Moreover, in *L. P. Stewart,* there was a complete absence of any issue or mention of prejudice to defendants from plaintiff's conduct. *In Re Cremida's Estate* (Appellants' Brief p. 23) does not involve an appeal by plaintiff from dismissal for want of prosecution. *Butner*

v. Neustadter (Appellants' Brief p. 23) involves an appeal by defendant against whom a default judgment of $22,277 was entered. *Allegro v. Afton Village Corporation* (Appellants' Brief p. 23) does not involve an appeal from the dismissal of a counterclaim for want of prosecution and did not involve prejudice to the counterdefendant. *Tozer v. Charles A. Krause Milling Co.*, (Appellants' Brief p. 24) involves a default judgment against defendant for $14,101. *Manos v. Fickenscher; Meadis v. Atl. Constr. & Supply Co;* and *Barr v. Rhea Radin Real Estate, Inc.* (Appellants' Brief p. 24) all are appeals by defendants against whom judgment by default were entered. *Hill v. Hawes* (Appellants' Brief p. 25) does not involve an appeal by a plaintiff whose case was dismissed for want of prosecution. The then Rule 77 construed by the Court did not impose a positive duty on plaintiff to take procedural steps in the event the clerk failed to give the prescribed notice of the entry of judgment following a hearing on the issues. By contrast, Rule 13 expressly commands plaintiff to take action and expressly provides that he is not excused because of a failure by the clerk of the court to warn a dilatory plaintiff of the prospect of dismissal.

CONCLUSION

The sole issue in this case is whether on the record the trial judge abused his discretion in upholding the dismissal of this case. It is clear from the undisputed facts and the applicable legal doctrines that the trial judge exercised sound judicial discretion in dismissing the case in view of (a) the protracted delays of plaintiffs which caused undisputed prejudice to defendants and (b) the failure

of plaintiffs' counsel to comply with the rules of the trial court. This court should therefore affirm the judgment below.

Respectfully submitted,

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740 Washington Building
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Attorney for Appellees

APPENDIX - BONHAM AFFIDAVIT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOSEPH M. BARNA, JR., *et al.*
Plaintiffs

vs.

CIVIL ACTION NO. 3096-64

GERALD C. BONHAM, *et al.*,
Defendants

AFFIDAVIT

STATE OF NEW YORK)
) SS:
COUNTY OF)

Doctor Glenn W. Tymeson, being first duly sworn under oath deposes and says that he is a medical doctor and a licensed physician in the State of New York. That he has as a patient under his care one Gerald C. Bonham, who has been under treatment since April 14, 1968, with moderately advanced arteriosclerotic changes involving the heart and cerebral blood vessels. That a recent chest X-ray shows evidence of some cardiac enlargement along with pulmonary emphysema, the latter of which has been present for several years, and also that there is evidence of marked calcification of the aorta. The EKG tracing further suggests some myocardial ischemia. All in all, Mr. Bonham is suffering from progressive arteriosclerosis in a generalized form and has a guarded prognosis. He is taking daily medication with diuretics and reserpine in order to keep his blood pressure at a reasonable level. In spite of this, the signs of cerebral vascular insufficiency are beginning to become evident in the form of occasional dizziness, headaches, and loss of memory for recent

events. Cardiac symptoms include progressive dyspnea on exertion and occasional chest pains associated with exertion or emotional stress.

In view of the preceding, the Affiant states that it is his professional opinion and to a reasonable medical certainty that Gerald C. Bonham should restrict his activities in general, travel only short distances, and avoid emotional disturbances as much as is possible. By the same token, the Affiant believes that traveling long distances to testify in Court and the appearance and act of testifying in Court would be detrimental to the health of Gerald C. Bonham.

GLENN W. TYMESON, M.D.

Subscribed and sworn to before me this 13th day of August, 1968.

June B. Zopp
Notary Public State of New York
Residing in Broome County

SEAL

My Commission Expires: March 30, 1970.